OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 6 September 2005 [1]

I — Introduction

1. Nowadays, compared with the pathos of Honoré de Balzac's masterly description of the suffering of César Birotteau when he finds that he must face his creditors, [2] the law treats very differently those with the misfortune of excessive debt, especially individuals, regardless of whether they carry on a professional or business activity. Stripped of his honour, his rights and the few assets his notary, Roguin, has left him, the fictional character, Birotteau, manages through his tenacity to get back on his feet, by paying off his debts one by one, a highly unusual practice at that time.

2. It does not seem fitting to regard the exquisite integrity of Monsieur Birotteau as an example of *bêtise de la vertu*, as his creator wrote in the first draft of the work in 1833, since, although it is a risk faced by all creditors, economic (trade certainty) and legal (*pacta sunt servanda*) factors make it advisable to foster a legal framework which guarantees the recovery of debts at European level too.

3. The question referred for a preliminary ruling by the Bundesgerichtshof fits exactly into that Community framework. The German Federal Court of Justice has asked the Court to rule on the extent to which jurisdiction is affected by the transfer of a debtor's centre of main interests to a Member State other than the one in which the request to open insolvency proceedings was filed. In particular, the Bundesgerichtshof wishes to know whether the court which is seised of that application retains jurisdiction to give judgment on the opening of proceedings.

4. However, since the facts of the main proceedings took place prior to the entry into force of Council Regulation (EC)

1 — Original language: Spanish.

2 — Balzac, H. de, *Histoire de la grandeur et de la décadence de César Birotteau, marchand parfumeur, adjoint au maire du deuxième arrondissement de Paris, chevalier de la Légion d'honneur, etc.* (first published in 1838 in a pocket edition entitled *César Birotteau*), Garnier Flammarion, Paris, 1995, in particular Chapter XVI, p. 353 et seq.

No 1346/2000 of 29 May 2000 on insolvency proceedings ('the Regulation'),[3] which governs jurisdiction in cases of bankruptcy and suspension of payments, uncertainty has arisen over the applicability of the Regulation, and that issue must therefore also be analysed.

II — The legal framework

5. This is the first time that the Court has been called upon to resolve a reference for a preliminary ruling on the interpretation of the Regulation. Accordingly, by way of introduction it is appropriate to summarise the main features of the Regulation, which will assist with the reply to the question. In addition to a brief historical summary, I will also outline the provisions of the Regulation, paying particular attention to the basic objectives it pursues.

A — *Historical development*

6. The development of the rules of insolvency proceedings in community law has Kafkaesque overtones, due not to the length of time it has taken but rather to the fact that the proposed convention underwent a mutation, similar to the transformation of Gregor Samsa,[4] which had a significant impact on the development of those provisions.

7. The idea of regulating insolvency proceedings within the Community has its origins in Article 220 of the EC Treaty (now Article 293 EC), which calls upon the Member States, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals, *inter alia*, the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

8. That provision gave rise, first of all, to the well-known 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[5] ('the Brussels Convention').

3 — OJ 2000 L 160, p. 1.

4 — In *Metamorphosis* by Franz Kafka (a doctor of laws from the University of Prague), which was written in 1912 and published in 1916, the ultimate fate of the hero is, however, tragic since, having been transformed into a beetle, he dies completely alone after taking the decision to stop eating: Kafka, F., *Die Verwandlung*, edited by Marjorie L. Hoover, W. W. Norton & Company Inc., New York, 1960, p. 57 et seq.

5 — OJ 1978 L 304, p. 36. Amended successively by the Convention of Accession of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and amended version p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). That legislation is currently contained in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

9. However, Article 1, point 2 of the Brussels Convention excludes from the scope of the convention 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings', and therefore those areas remained to be dealt with in a future agreement between the Member States. Nevertheless, a committee of experts drafted two proposals between 1963 and 1980. In the case of the second proposal, which was based on the principles of unity and universality, [6] a group from the Council of the Community was asked to prepare a report but work was suspended in 1985 owing to lack of agreement. [7]

10. It is important to point out that, even before the decision was taken to adopt the Community legislation, the Member States had fostered the process of mutual recognition and enforcement of judgments in bankruptcy proceedings by means of bilateral treaties, a list of which is set out in Article 44(1) of Regulation No 1346/2000. That article provides that the Regulation is to replace the conventions concerned.

11. In addition, other initiatives arose outside the Community sphere, particularly within the Council of Europe, which culminated in the European Convention on certain international aspects of bankruptcy opened for signature in Istanbul in 1990 ('the Istanbul Convention'). However, the entry into force of Regulation No 1346/2000 leaves the ratification of that convention in doubt. The main contribution of the Istanbul Convention is the introduction of greater flexibility in the use of the abovementioned principles. [8]

12. The Istanbul Convention left its mark on the subsequent process of drafting the Regulation, because, with a view to avoiding the complexities of the 1985 draft convention, an ad hoc group of national experts finalised the text of the Convention on Insolvency Proceedings, done at Brussels on 23 November 1995, which has a less rigid approach and simpler solutions. [9]

13. Unlike its immediate predecessor at Community level, the scheme of the latter convention was based around the principle of universality limited by the possibility of opening one or more secondary proceedings in other States, whose scope was limited to the respective territories of those countries. [10]

14. Since not all 15 Member States acceded to it, the 1995 convention collapsed irrevocably. However, as a result, the convention

6 — By 'principle of unity' is meant the existence of a single set of proceedings for the whole of the territory of the Community, while 'principle of universality' refers to the fact that the proceedings extend to all the debtor's assets wherever they may be situated.

7 — Virgós/Schmit Report on the Convention on Insolvency Proceedings ('Virgós/Schmit Report') in Virgós Soriano, M. and Garcimartín Alférez, F.J., *Comentario al Reglamento Europeo de Insolvencia*, Civitas, Madrid, 2003, point 3.

8 — Virgós/Schmit Report, point 4.

9 — Virgós/Schmit Report, point 5.

10 — Ibid.

underwent a transformation, rather like a chrysalis: its content was unaltered but its legal status changed so that it ceased to be an international treaty and became a regulation pursuant to the second paragraph of Article 249 EC.

15. Nurtured by Finland and Germany, the impulse for that transformation flourished in the fertile ground of Articles 61(c) EC (formerly Article 73i of the EC Treaty) and 67(1) EC, (formerly Article 730 of the EC Treaty), which were 'communitarised' under the Treaty of Amsterdam, thereby constituting one of that Treaty's main achievements. [11]

16. The convention was finally free from the creeping fate to which it was destined by its former status as a treaty and its new nature endowed it with the gracefulness resulting from the direct applicability inherent in regulations.

B — *Outline of the content and relevant provisions of the Regulation*

17. It is clear from the preamble to Regulation No 1346/2000 that the proper functioning of the internal market requires three main elements in the sphere of insolvency: first, a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets; [12] second, the effectiveness of cross-border insolvency proceedings; [13] and, lastly, the avoidance of so-called forum shopping, that is where parties have incentives to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. [14]

18. The Regulation does not seek to govern insolvency proceedings in an all embracing consolidated manner but rather the applicable law, international jurisdiction to open such proceedings, and the recognition of those proceedings in other Member States.

19. The first chapter of the Regulation consists of a number of general provisions relating to the material scope of the Regulation (Article 1), determination of the court having jurisdiction (Article 3), and the law applicable to certain specific situations (Articles 4 to 15). [15]

11 — Wiedemann, T., 'Visa, Asyl, Einwanderung', in Schwarze, J. (Coord.), *EU-Kommentar*, Baden-Baden, 2000, p. 842.

12 — Recital 3 in the preamble to Regulation No 1346/2000.

13 — Recital 2 in the preamble to Regulation No 1346/2000.

14 — Recital 4 in the preamble to Regulation No 1346/2000.

15 — The subject-matter governed by those provisions include: third parties' rights in rem (Article 5); set-off (Article 6); reservation of title (Article 7); contracts relating to immovable property (Article 8); payment systems and financial markets (Article 9); contracts of employment (Article 10); effects on rights subject to registration in a public register (Article 11); Community patents and trade marks (Article 12); acts detrimental to creditors (Article 13); protection of third-party purchasers in the case of acts concluded after the opening of insolvency proceedings (Article 14); and the effects of insolvency proceedings on lawsuits pending (Article 15).

20. Chapter I sets out a number of definitions, some of which have a significant bearing on the answer to the question referred, in particular Article 2(e) and (f), which provide that:

'...

(e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

...'

21. The cornerstone of the system is found in the first sentence of Article 3(1), which confers jurisdiction to open insolvency proceedings on the courts of the Member State within the territory of which the centre of a debtor's main interests is situated.

22. Also of relevance to the question referred and to the uncertainty concerning the applicability of the Regulation are Article 4(1) and (2), which provide that the proceedings and their effects are to be governed by the law of the State in which those proceedings are opened.

23. The provisions of Chapter II, on the recognition of proceedings in the other Member States, also have a bearing on this case. Article 16(1) lays down the principle of recognition by providing that any judgment opening insolvency proceedings handed down by a competent court of a Member State must be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. Chapter II contains a number of provisions governing the powers of the liquidator and a safeguard clause under which a Member State may refuse the recognition referred to in Article 16(1) where public policy is jeopardised following the opening of proceedings. [16]

24. Chapters III and IV, [17] which are less significant for the purposes of this reference for a preliminary ruling, concern, respectively, secondary insolvency proceedings opened in particular circumstances in other Member States, and the duty to inform creditors and their right to lodge claims they consider appropriate.

16 — Article 26 of Regulation No 1346/2000.

17 — Articles 27 to 38 and 39 to 42, respectively, of Regulation No 1346/2000.

25. Article 38 provides as follows with regard to preservation measures:

'Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.'

26. Lastly, Chapter V contains transitional and final provisions. [18] In connection with the question submitted by the Bundesgerichtshof, the first sentence of Article 43 provides that the Regulation applies only to insolvency proceedings opened after its entry into force which, in accordance with Article 47, was to be on 31 May 2002.

III — The facts, the main proceedings and the question referred for a preliminary ruling

27. Ms Staubitz-Schreiber operated a telecommunications equipment and accessories business as a sole trader in Wülfrath, Germany. On 6 December 2001, she requested the opening of insolvency proceedings regarding her assets before the Amtsgericht Wuppertal, Germany.

28. However, since there were not enough assets that could be secured the Amtsgericht dismissed the request by order of 10 April 2002.

29. The debtor, who has been resident in Spain since 1 April 2002, and wishes to live and work there, appealed, asking that the order be set aside and insolvency proceedings opened.

30. By order of 14 August 2002, the appeal court dismissed the appeal, holding that the request for the opening of insolvency proceedings was inadmissible on the ground that Ms Staubitz-Schreiber's move meant that jurisdiction for opening the proceedings had been transferred to Spain, pursuant to Article 3 of Regulation No 1346/2000.

31. In the appeal on a point of law lodged against that judgment, Ms Staubitz-Schreiber

18 — Articles 43 to 47 of Regulation No 1346/2000.

asks the Bundesgerichtshof to set aside the judgment and to refer the case back to the Amtsgericht Wuppertal for a fresh decision.

32. Since it it not clear how to interpret Article 3 of Regulation No 1346/2000 the Bundesgerichtshof has therefore decided to stay proceedings and refer the following question to the Court of Justice:

'Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?'

IV — The procedure before the Court of Justice

33. Written observations were presented, within the time-limit laid down in Article 20 of the EC Statute of the Court of Justice, by the Commission and the German and Netherlands governments.

34. No hearing was held since the parties to the proceedings had not so requested.

V — Analysis of the question referred

A — *Preliminary issue: is the Regulation applicable to the main proceedings?*

35. The request for the opening of insolvency proceedings and the dismissal of that request by the court in question on the grounds of lack of sufficient total assets both preceded the entry into force of the Regulation. Accordingly, uncertainty has arisen as to whether the Regulation is applicable to this case. It might therefore be helpful to make a number of points in that regard.

36. The national court has not addressed the matter directly and merely sets out, at point 2 of the order for reference, a brief summary of the problem, which is affirmative in its approach.

37. The Bundesgerichtshof maintains that dismissal of the request for the opening of proceedings does not equate to the opening

of insolvency proceedings and, therefore, under German insolvency law, the proceedings had not been opened before the entry into force of the Regulation.

38. The German Government shares the view put forward by the Bundesgerichtshof. It adds that the appeal lodged by Ms Staubitz-Schreiber means that the opening of insolvency proceedings was still pending after 31 May 2002. Since the appellant asked not only for the judgment dismissing her request to be set aside but also for a positive judgment in that regard, the German Government submits that, because the request was still pending when the Regulation entered into force, the main proceedings must be resolved in the light of those Community rules.

39. The Commission infers from Article 43 of Regulation No 1346/2000 that the question whether the Regulation is applicable hinges on the time of opening of the proceedings and there is no need for transitional provisions where the request has been filed but the proceedings have not been opened. In the opinion of the Commission, the absence of such provisions bolsters the view that such cases fall wholly within the scope of the Regulation.

40. With regard to this case. the Commission points out that, on 31 May 2002, no judgment opening proceedings had been handed down in Germany or in any other Member State, and therefore the solution must be sought in the Regulation.

41. According to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts, [19] which requires their respective jurisdiction to be respected. In the context of that cooperation, the national referring court, which alone has direct knowledge of the facts of the main proceedings and must assume responsibility for the decision, is in the best position to determine, having regard to the particular features of the case, the need for a preliminary ruling and the *relevance of the questions* which it submits to the Court. [20] In turn, it is for the Court to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. [21]

42. Since the order for reference refers to the first sentence of Article 43 of Regulation No 1346/2000 and the resolution of the dispute in the main proceedings hinges on the applicability that part of the provision must be examined. [22]

43. In accordance with the first sentence of Article 43, the applicability of the Regulation

19 — See Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 14, and Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 33, and the case-law cited therein.

20 — *Lourenço Dias*, paragraph 15; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; *Siemens and ARGE Telekom*, paragraph 34; and Case C-247/02 *Sintesi* [2004] ECR I-9215, paragraph 22.

21 — Case C-88/99 *Roquettes Frères* [2000] ECR I-10465, paragraph 18; and Case C-469/00 *Ravil* [2003] ECR I-5053, paragraph 27.

22 — The Court applied the same methodology in Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 94.

is dependent on whether the proceedings were opened after its entry into force, since the provision also lays down the principle of non-retroactivity. [23]

44. Article 2(e) and (f) of the Regulation draw a distinction between a judgment in relation to the opening of insolvency proceedings and the time of the opening of proceedings. The fact that both definitions are included means that the two cannot be contemporaneous.

45. The former is confined to the act formally adopted in insolvency proceedings, while point (f) refers to the time when the judgment becomes effective, whether or not it is a final judgment.

46. In addition, in accordance with Article 4 of the Regulation, the proceedings and their effects are governed by the law of the Member State in which they are opened.

47. As the German Government rightly submits, in the case before the Court there has been no positive judgment in that sense, and therefore no such judgment has become effective. Accordingly, it would be possible to conclude that when the Regulation entered into force the proceedings had not been opened, from which it would follow that the Regulation is applicable.

48. However, Ms Staubitz-Schreiber has appealed not only to have the contested judgment dismissing the request set aside but also for a positive judgment. Accordingly, the national court must establish whether, under German law, proceedings have been opened within the meaning of the rule in question, and must determine whether the opening of proceedings took place before or after 31 May 2002, because of the possibility of retroactivity.

49. Furthermore, that solution is compatible with the letter and the spirit of Regulation No 1346/2000, which refers to the applicable national law. [24]

B — *The question referred for a preliminary ruling*

50. The German Government contends that by conferring jurisdiction to open insolvency proceedings on the courts of the Member State within whose territory the centre of a debtor's main interests is situated, Article 3

23 — Virgós Soriano, M. and Garcimartín Alférez, F.J., op. cit., p. 37.

24 — Articles 2(f) and 4 of Regulation No 1346/2000.

of Regulation No 1346/2000 merely stipulates the material requirements governing international jurisdiction. Since the article provides no guidance regarding the time when those requirements must be met or the circumstances which give rise to a change in the court having jurisdiction, the German Government argues that the article must be construed in the light of its purpose.

51. The German Government asserts that one of the principal objectives of the Regulation [25] is to avoid forum shopping, that is to preclude debtors from choosing the national legal system which is most favourable to them. Furthermore, the reference to the centre of a debtor's main interests is based on the presumption that that is the place where the majority of his creditors will be located and also on the need for procedural economy, since if the filing of the request to open proceedings was not the decisive point in time for the purposes of jurisdiction, difficulties relating to proof and resulting delays, would arise. In addition, it is important for creditors to know for certain where the centre of a debtor's interests is situated so that they do not have to make enquiries in that regard.

52. Finally, the German Government points out that the universality of such proceedings enables the liquidator appointed by the court to exercise his powers in other Member States where the debtor also owns assets, without the need to open other proceedings.

25 — The German Government refers to the fourth recital in the preamble to Regulation No 1346/2000.

53. The Netherlands Government shares the opinion of the German Government and maintains that the court seised of the request for the opening of proceedings retains jurisdiction to give judgment in that regard, even where the debtor has transferred his centre of main interests to another Member State in the meantime. The Netherlands Government argues that that view is borne out by the power to adopt preservation measures in Article 38 of Regulation No 1346/2000, which, like Article 3, confers that power by reference to the situation when the request is filed, since otherwise debtors would be able to circumvent temporary preservation measures by transferring the centre of their main interests when it suited them (forum shopping).

54. However, the Netherlands Government qualifies its position by accepting that in certain circumstances, for practical reasons, the scheme of the Regulation empowers a court seised of a request to stay or dismiss that request if it is certain that there is a right to open the proceedings in the place to which the debtor has moved.

55. The Commission also supports the view that, in the circumstances of the case in the main proceedings, the court with which the request was lodged retains jurisdiction. The Commission submits that that approach is borne out by a grammatical, historical and teleological interpretation of Article 3.

56. In the opinion of the Commission, although the principle of *perpetuatio fori* circumvents the risk of forum shopping, that is not to say that the strategy is simple to use because it involves obtaining detailed information about the advantages and disadvantages of the insolvency laws of the different Member States, in addition to the desire to transfer the centre of main interests to another Member State.

57. The Commission attaches greater weight to the argument that the principle of *perpetuatio fori* ensures the legal certainty required by creditors and courts. The former are able to calculate, at least partially, the risk in the event that a debtor becomes insolvent and they also know that the applicable law will not change after filing of the request. For their part, courts are not constantly required to determine whether they have jurisdiction between the time of filing of the request and the judgment opening proceedings.

58. In the question referred, the Bundesgerichtshof seeks guidance on whether a court which has received a request for the opening of proceedings has jurisdiction to make a declaration of insolvency where the debtor has transferred her centre of main interests to another Member State in the meantime.

59. Under Article 3 of Regulation No 1346/2000, jurisdiction rests with the Member State in which the 'centre of a debtor's main interests' is situated. Therefore, the definition of that concept and the time which must be taken into consideration are of particular significance.

(a) The centre of a debtor's main interests

60. It is important to point out, first of all, that the term has the status of an independent concept of Community law, which confers on it a uniform meaning that is independent of the national legal systems. [26] It must therefore be given a single Community definition. [27]

61. The second sentence of Article 3(1) creates a reputable presumption with regard to companies and legal persons, by equating registered office with centre of main interests. However, the case of Ms Staubitz-

26 — Virgós Soriano, M. and Garcimartín Alférez, F.J., op. cit., p. 45.

27 — Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 16, and the case-law cited therein. With regard to the Brussels Convention, which is more relevant to the question referred for a preliminary ruling, see Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 20, and the case-law referred to, and Case C-295/95 *Farell* [1997] ECR I-1683, paragraphs 12 and 13, and the case-law cited therein.

Schreiber involves a natural person who carried on business as a trader rather than under the cover of a company.

62. Regulation No 1346/2000 provides no guidance for such a situation. It appears from the 13th recital in the preamble to the Regulation that the decision in question refers to the place where a debtor conducts the administration of his interests on a regular basis, which is straightforward for third parties to ascertain. Thus, the centre of the main interests of an individual who carries on a business activity is deemed to be his or her *business* address, while, for other natural persons, it is deemed to be their habitual residence. [28]

63. It is also important to note that, in accordance with the 17th recital in the preamble to the Regulation, the right to open secondary proceedings in other Member States in parallel with the main proceedings is subject to the requirement that the debtor must have an establishment in the Member State concerned, while, under Article 27, the effects of secondary proceedings are restricted to the assets situated within the territory of the Member State in which those proceedings are conducted.

64. It follows from the foregoing that there must be a link between a debtor's business assets and the place of the proceedings, thereby ensuring the best protection for creditors by enabling them to calculate the legal risks they must assume in the event of insolvency. [29] For that reason, academic legal writers argue that where a person engaged in a trade or business (sole operator or trader, for example) is resident in one Member State but carries on his activities from an establishment situated in another State, the latter State is deemed to be the competent forum, provided that the insolvency proceedings concerned result from the exercise of the trade or business. [30]

65. Furthermore, the definition of 'establishment' in Article 2(h) of the Regulation [31] excludes the mere existence of assets as a ground for the opening of insolvency proceedings. [32]

66. In the main proceedings, since only a short time elapsed between the filing of the request for the opening of proceedings and Ms Staubitz-Schreiber's move to Spain, it is unlikely that she has acquired assets in that country in an amount such that they fulfil the definition of an establishment within the meaning referred to above.

28 — Virgós/Schmit Report, point 75.

29 — Ibid.

30 — Moss, G., Fletcher, I. and Isaacs, S., *The EC regulation on insolvency proceedings: a commentary and annotated guide*, Oxford University Press, Oxford, 2002, p. 169.

31 — Under that provision, 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods' is regarded as an establishment.

32 — Virgós/Schmit Report, point 70.

67. Accordingly, the answer to the question referred for a preliminary ruling must be addressed on the basis that it is for the national court to establish the location of the debtor's effective centre of interests using the information available to it, without there being any need to discuss whether that court could declare jurisdiction or dismiss the request under German law, as the Netherlands Government has proposed, because the referring court has not raised those questions.

(b) Time of determination of the centre of main interests

68. The Commission draws attention to the fact that the first sentence of Article 3(1) of Regulation No 1346/2000 does not refer to the 'time of the opening of proceedings' with regard to the determination of a debtor's centre of main interests, notwithstanding that the term — defined, it will be recalled, in Article 2 — appears on a number of occasions as a requirement for the application of the Regulation. [33] The Commission argues that, at the very least, that is an indication that the Community legislature does not regard the determination of a debtor's centre of main interests as being dependent on that factor, although the Community legislature does not provide an alternative.

69. There are two strong arguments in favour of proposing that the centre of main interests must be determined at the time the request for the opening of proceedings is filed. The first argument concerns the stated objective of avoiding forum shopping, while the second relates to the power of the court seised of the request to adopt preservation measures.

(i) The prevention of forum shopping

70. It is appropriate to make some brief points about forum shopping in order to focus the discussion since, in general, lawyers regard the term as pejorative.

71. If forum shopping is defined as the search by a plaintiff for the international jurisdiction most favourable to his claims, [34] there is no doubt that, in the absence of legal uniformity in the different private international law systems, that phenomenon must be accepted as a natural consequence which is not open to criticism. [35]

33 — Articles 5 and 7(1) and (2) of Regulation No 1346/2000.

34 — Checa Martínez, M., 'Fundamentos y límites del *forum shopping*: modelos europeo y angloamericano', *Rivista di diritto internazionale privato e processuale*, 1998, No 3, p. 521.

35 — Juenger, F.K., 'What's wrong with forum shopping?' *Sydney Law Review*, 1994, p. 5 et seq., in particular pp. 12 and 13.

72. Thus the dispute is dealt with at the place which is most suitable for reasons of substance and procedure. Forum shopping is merely the optimisation of procedural possibilities and it results from the existence of more than one available forum, which is in no way unlawful. [36]

73. However, where forum shopping leads to unjustified inequality between the parties to a dispute with regard to the defence of their respective interests, the practice must be considered and its eradication is a legitimate legislative objective.

74. The Community legislature took that approach in relation to insolvency and analogous proceedings, because, in the 4th recital in the preamble to the Regulation the legislature states its intention to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position, and includes the term forum shopping in brackets.

75. That fundamental principle of Regulation No 1346/2000 would be rendered worthless if a debtor were entitled to transfer the centre of his main interests to another Member State between the filing of the request and the judgment opening insolvency proceedings. Such an interpretation is incompatible with the efficient operation of cross border insolvency proceedings which, pursuant to the 2nd recital in the preamble thereto, the Regulation seeks to achieve, because it would oblige creditors to pursue debtors wherever the latter chose to establish themselves with any degree of permanence, thereby depriving the former of the necessary legal certainty.

76. Moreover, as the Commission states in its written observations, such conduct would mean that the courts in every place where a debtor established himself would be required to determine, of their own motion, whether or not they had jurisdiction, [37] which would be incompatible with the principle of the sound administration of justice.

77. In any event, on the facts of the main proceedings this is not a case of forum shopping, since Ms Staubitz-Schreiber herself argues for the jurisdiction of the court with which she filed the request for the opening of insolvency proceedings. The reason for her position is a special feature of German insolvency law known as *Restschuldbefreiung*, pursuant to which a debtor receives a general discharge from any

36 — Siehr, K., 'Forum shopping im internationalen Rechtsverkehr', *ZfRV*, 1984, p. 133 et seq.; Schack, H., *Internationales Zivilverfahrensrecht*, 2nd ed., Munich, 1996, pp. 86 and 87.

37 — Virgós/Schmit Report, point 79.

remaining debts which have not been paid with the return from the realisation of assets, [38] a rule which is unknown in the legal systems of the other Member States. [39]

(ii) The power to order preservation measures

78. As I pointed out above, Article 38 of Regulation No 1346/2000 empowers a temporary administrator to request any measures to secure and preserve any of the debtor's assets situated in another Member State for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings. The 16th recital in the preamble to the Regulation draws attention to the importance of that kind of measure of the effectiveness of the insolvency proceedings.

79. Article 38 is designed to facilitate the taking of appropriate protective measures to ensure that the total assets remain intact prior to the opening of the proceedings. [40] There is debate among academic legal writers as to the requirements which must be met for an administrator to take action in other Member States, in particular the question whether the conditions for the opening of secondary proceedings must be satisfied, namely that the debtor must have an establishment in the other Member States concerned. [41] Although that point is of general practical significance, it does not arise in the present case and it is therefore not necessary to examine it in any further detail.

80. It is, however, important to make clear the scope of the powers conferred on a temporary administrator by Article 38 of the Regulation. It is clear from the wording of that provision that the powers are extensive, since the administrator may request 'any measures to secure and preserve' a debtor's assets.

81. The fact that Article 38 provides that the measures concerned must be ordered under the national law of the Member State where they are to take effect favours their recognition which, in accordance with the first subparagraph of Article 25(1), is virtually automatic and is evidence of the Community legislature's desire to accelerate cross-border insolvency proceedings within the meaning of the second recital.

38 — In fact, rather than being a discharge in the strict sense, the procedure involves a suspension of the power to enforce debts which have not been paid in the insolvency proceedings, subject to a condition of good conduct for a period of six years following the declaration of the application of that rule. Pape, G. and Uhlenbruck, W., *Insolvenzrecht*, Munich 2002, p. 689 et seq.

39 — Carrasco Pereira, A. points out that the procedure does not exist in Spanish law in '¿Por qué quiebran los consumidores?', *Actualidad jurídica Aranzadi*, Year XV, No 669, 14 May 2005, p. 3.

40 — Duursma-Kepplinger, H.-C., Duursma, D. and Chalupsky, E., *Europäische Insolvenzverordnung — Kommentar*, Vienna, 2002, p. 558; Moss, G., Fletcher, I. and Isaacs, S., op. cit., p. 228.

41 — In favour of that view Virgós/Schmit Report, point 262, and Duursma-Kepplinger, H.-C., Duursma, D. and Chalupsky, E., *Europäische Insolvenzverordnung — Kommentar*, op. cit., p. 560. Against Moss, G., Fletcher, I. and Isaacs, S., op. cit., p. 229, who assert that a temporary administrator may also exercise that power in relation to assets only even though they do not constitute an establishment within the meaning of Regulation No 1346/2000.

82. Against that background, to hold that it is legitimate for a debtor to transfer his centre of main interests in the period between the request for the opening of proceedings and the opening of insolvency proceedings would undermine the foundations of the whole scheme of the Regulation. In graphic terms, that would ultimately lead to creditors and courts continually having to pursue insolvent debtors in a vicious circle of requests for the opening of insolvency proceedings and transfers of centres of main interests which would never reach a satisfactory conclusion. Such a fate would have more in common with the legend of the Flying Dutchman than with the proper application of the Regulation on insolvency proceedings.

83. It follows from the foregoing that the transfer of an insolvent debtor's centre of main interests in the period between the request for the opening of proceedings and the opening of insolvency proceedings does not alter the jurisdiction of the court before which the request to open insolvency proceedings was lodged.

VI — Conclusion

84. In the light of the above considerations, I propose that the Court reply as follows to the question referred for a preliminary ruling by the Bundesgerichtshof, Germany:

The court of the Member State which received a request for the opening of insolvency proceedings has jurisdiction to open those proceedings, even if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened.