JUDGMENT OF THE COURT (First Chamber)

17 November 2011 *

In Case C-112/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hof van Cassatie (Belgium), made by decision of 4 February 2010, received at the Court on 1 March 2010, in the proceedings

Procureur-generaal bij het hof van beroep te Antwerpen

v

Zaza Retail BV

THE COURT (First Chamber),

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

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

* Language of the case: Dutch.

having regard to the written procedure and further to the hearing on 31 March 2011,

after considering the observations submitted on behalf of:

— Zaza Retail BV, by M. Cordewener, advocaat,

— the Greek Government, by M. Michelogiannaki, Z. Chatzipavlou and K. Georgiadis, acting as Agents,

— the European Commission, by R. Troosters and S. Petrova, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(4)(a) and (b) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) ('the Regulation').

2 The reference has been made in proceedings between the Procureur-Generaal bij het hof van beroep te Antwerpen (Procurator General at the Court of Appeal, Antwerp) (Belgium) and Zaza Retail BV ('Zaza Retail'), a company incorporated under the laws of the Netherlands established in Amsterdam (Netherlands), regarding a petition for insolvency filed by the Procurator General against the Belgian establishment of Zaza Retail.

Legal context

European Union legislation

3 Recital 12 in the preamble to the Regulation states:

'This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.'

4 Recital 17 of the Regulation provides:

'Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary…'

5 Article 3 of the Regulation, which deals with international jurisdiction, states:

'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...

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.

…

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;

or

(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.'

6 Article 29 of the Regulation, concerning the right to request the opening of secondary proceedings, provides:

'The opening of secondary proceedings may be requested by:

(a) the liquidator in the main proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.'

National legislation

7 Article 3(1) of the Faillissementswet (Law on insolvency) of 8 August 1997 (*Belgisch Staatsblad* of 28 October 1997, p. 28562), as amended by the Law of 4 September 2002 (*Belgisch Staatsblad* of 21 September 2002, p. 42928), states:

'If the centre of a debtor's main interests is situated in another Member State of the European Union, that debtor can, if it has an establishment in Belgium, be declared insolvent in accordance with the provisions of the regulation…'

8 Article 6 of that law provides:

'Notwithstanding the provisions of the Wet betreffende het gerechtelijk akkoord [Law on judicial administration], a declaration of insolvency takes place by decision of the Rechtbank van Koophandel [Commercial Court] before which the matter has been brought, either upon a declaration by the trader, or a petition by one or more creditors, the Openbaar Ministerie [Belgian Public Prosecution Service], the provisional administrator within the meaning of Article 8 or the liquidator in the principal proceedings in the case referred to in Article 3(1).'

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

9 On 14 November 2006 the Procureur des Konings (Public Prosecutor) at the Rechtbank van eerste aanleg te Tongeren (Court of First Instance, Tongeren) (Belgium) applied for a declaration of insolvency in respect of the Belgian establishment of Zaza Retail, the centre of main interests of which is in Amsterdam (Netherlands).

10 At that stage no insolvency proceedings had yet been opened against Zaza Retail in the Netherlands.

11 By decision of 4 February 2008, the Rechtbank van Koophandel te Tongeren (Commercial Court, Tongeren) declared Zaza Retail insolvent.

12 By judgment of 9 October 2008 the Hof van beroep te Antwerpen (Court of Appeal, Antwerp) revised the decision of the Rechtbank van Koophandel and ruled that neither that court nor the Hof van beroep itself had the requisite international jurisdiction to rule on the opening of territorial insolvency proceedings against Zaza Retail in the light of the establishment that it had in Belgium.

13 The Public Prosecution Service appealed to the Hof van Cassatie van België against that judgment. It submits, first, that the term 'creditor' used in Article 3(4)(b) of the Regulation cannot be interpreted narrowly and that the Public Prosecution Service may also request the opening of insolvency proceedings. In so doing, the Public Prosecution Service fulfils the function of guardian of the public interest and intervenes in the place of institutional and individual creditors where they fail to act. Secondly, the Public Prosecution Service argues that the exception in Article 3(4)(a) of the Regulation is also applicable to the request to open insolvency proceedings made by the Public Prosecution Service, since – if it had no such competence – it would be unable to have main proceedings opened in the Netherlands, which is the Member State in which the debtor has the centre of its main interests.

14 In those circumstances the Hof van Cassatie decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the term "the conditions laid down" in Article 3(4)(a) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings also cover conditions relating to the capacity or the interest of a person – such as the public prosecution service of another Member State – to request the opening of insolvency

proceedings, or do those conditions relate only to the substantive conditions for being made subject to such proceedings?

(2) Can the term "creditor" in Article 3(4)(b) of Regulation No 1346/2000 be interpreted broadly to mean that a national authority which, under the law of the Member State to which it belongs, has power to request the opening of insolvency proceedings and acts in the public interest and as the representative of all the creditors, may also, in the present case, validly request the opening of territorial insolvency proceedings pursuant to Article 3(4)(b) of that regulation?

(3) If the term "creditor" can also refer to a national authority with the power to request the opening of insolvency proceedings, does the application of Article 3(4)(b) of Regulation No 1346/2000 require that national authority to demonstrate that it is acting in the interests of creditors who themselves have their domicile, habitual residence or registered office in the country of that national authority?'

15 Parallel to the insolvency proceedings opened in Belgium, Zaza Retail was declared insolvent by decision of 8 July 2008 of the Rechtbank te Amsterdam (District Court, Amsterdam).

Consideration of the questions referred

Preliminary observations

16 Before examining the questions referred, it is important to recall the system put in place by the Regulation.

17 In that regard, Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings' or 'territorial proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see, to that effect, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28, and Case C-444/07 *MG Probud Gdynia* [2010] ECR I-417, paragraph 22).

18 The opening of secondary or territorial proceedings is subject to different conditions according to whether or not main proceedings have already been opened. In the first situation, the proceedings are described as 'secondary proceedings' and are governed by the provisions of Chapter III of the Regulation. In the second, the proceedings are described as 'territorial insolvency proceedings' and the circumstances in which proceedings can be opened are determined by Article 3(4) of the Regulation. That provision concerns two situations: first, where it is impossible to open main proceedings because of the conditions laid down by the law of the Member State where the debtor has the centre of its main interests and, secondly, where the opening of territorial proceedings in the Member State within the territory of which the debtor has an establishment is requested by certain creditors having a particular connection with that territory.

19 By its questions, the referring court asks the Court to clarify the rules applicable in those two situations.

The first question

20 By its first question, the court asks, in essence, whether the expression 'conditions laid down' in Article 3(4)(a) of the Regulation, which refers to conditions, which under the law of the Member State where the debtor has the centre of its main interests, prevent the opening of main insolvency proceedings in that State, must be interpreted as referring only to substantive conditions relating to the capacity of the debtor or as also including conditions relating to the capacity of persons empowered to request the opening of such a procedure.

21 In that regard, it should be recalled that Article 3(4)(a) of the Regulation concerns the situation where main insolvency proceedings 'cannot be opened'. Recital 17 of the Regulation refers to the situation where such proceedings 'cannot be opened' under the law of the Member State where the debtor has the centre of his main interests. It follows from that wording that the impossibility of opening main proceedings must be objective and cannot vary according to the specific circumstances in which the opening of such proceedings is requested.

22 That reading is consistent with the objective pursued by Article 3(4)(a) of the Regulation which is, as is apparent from Recital 17, that cases where the opening of territorial insolvency proceedings can be requested before that of the main insolvency proceedings are limited to what is absolutely necessary. Although the system put in place by the Regulation allows main proceedings and secondary proceedings to coexist, it is, as is pointed out in Recital 12, in compliance with mandatory rules of coordination intended to satisfy the need for unity in the European Union. Such coordination cannot be ensured if main proceedings have not been opened.

23 As Zaza Retail, the Greek Government and the European Commission submitted, it may be impossible to open main insolvency proceedings because of characteristics relating to the capacity of the debtor, preventing the latter from being subject to insolvency proceedings. By way of example, they refer, pertinently, to the situation where one of the conditions laid down by the law of the Member State within the territory of which the debtor has the centre of its main interests is that he be a trader, which the debtor is not, or where the debtor is a public undertaking which, according to that law, cannot be declared insolvent.

24 However, the impossibility of opening main insolvency proceedings cannot just be the result of the fact that a specified person, such as the representative of the public prosecution service of a Member State within the territory in which the debtor has an establishment, does not have, according to the Member State where the debtor has the centre of its main interests, capacity to request the opening of main proceedings in that Member State. Where it is not disputed that other persons, in particular creditors, are empowered to submit such a request, it follows that the opening of main proceedings is indeed possible.

25 That is indeed the case in the main proceedings, since according to the order for reference, Zaza Retail has been declared insolvent in the Netherlands by decision of the District Court of Amsterdam of 8 July 2008.

26 The answer to the first question is therefore that the expression 'conditions laid down' in Article 3(4)(a) of the Regulation, which refers to conditions, which, under the law of the Member State where the debtor has the centre of its main interests, prevent the opening of main insolvency proceedings in that State, must be interpreted as not referring to conditions excluding particular persons from the category of persons empowered to request the opening of such proceedings.

The second question

27 By its second question, the referring court asks, in essence, if the term 'creditor' in Article 3(4)(b) of the Regulation, which is used to designate the persons empowered to request the opening of territorial insolvency proceedings, can be interpreted as including an authority of a Member State whose task under the national law of that State is to act in the public interest and with a view to safeguarding the interests of all the creditors.

28 First of all, it should be observed that the Regulation does not define the term 'creditor'.

29 It is also important to bear in mind that, for the reasons set out in paragraphs 21 and 22 of the present judgment, the conditions for opening territorial insolvency proceedings under Article 3(4)(b) of the Regulation must be interpreted strictly.

30 That restrictive approach is apparent from a comparison of the provisions of Article 3(4)(b) and those of Article 29 relating to the right to request the opening of secondary proceedings. Whereas Article 29 gives that right to the liquidator in the main insolvency proceedings as well as any person or authority empowered by the law of the Member State in which the request to open proceedings is made, Article 3(4)(b) of the Regulation restricts the category of persons empowered to act to certain specified creditors showing a particular connection with the Member State within the territory of which the relevant establishment of the debtor is located. They are creditors established in that Member State and creditors of that establishment.

31 As regards the Belgian Public Prosecution Service, it should be observed, as the Commission has done, that, in the absence of any claim of its own to lodge against the debtor's estate, it is not a creditor within the usual meaning of that term in insolvency proceedings.

32 It is apparent from the order for reference that the task of the Public Prosecution Service, in the context of those proceedings, is to act in the public interest. The intervention of that public authority helps to address an undertaking's difficulties in a timely manner, by making up for the debtor's and its creditors' failure to act where that is appropriate. Although it cannot be ruled out that the Public Prosecution Service's intervention may, in certain cases, be in the interest of all the creditors, or at least some of them, it seems clear that the authority intervenes neither as creditor nor as a representative of all the creditors. Indeed, it is expressly stated in the order for reference that, under Belgian law, the Public Prosecution Service does not act in the name or on behalf of the creditors.

33 Having regard to the narrow interpretation that must be given to Article 3(4)(b) of the Regulation, a public authority acting in those circumstances cannot be regarded as a creditor within the meaning of that provision and, consequently, be included in the category of persons empowered to request the opening of territorial insolvency proceedings.

34 In the light of the foregoing considerations, the answer to the second question is that the term 'creditor' in Article 3(4)(b) of the Regulation, which is used to designate the persons empowered to request the opening of territorial insolvency proceedings, must be interpreted as not including an authority of a Member State whose task under the national law of that State is to act in the public interest, but which does not intervene as a creditor, or in the name or on behalf of those creditors.

The third question

35 In view of the answer to the second question, there is no need to answer the third question.

Costs

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

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

1. **The expression 'conditions laid down' in Article 3(4)(a) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which refers to conditions, which, under the law of the Member State where the debtor has the centre of its main interests, prevent the opening of main insolvency proceedings in that State, must be interpreted as not referring to conditions excluding particular persons from the category of persons empowered to request the opening of such proceedings.**

2. **The term 'creditor' in Article 3(4)(b) of the Regulation, which is used to designate the persons empowered to request the opening of territorial insolvency**

proceedings, must be interpreted as not including an authority of a Member State whose task under the national law of that State is to act in the public interest, but which does not intervene as a creditor, or in the name or on behalf of those creditors.

[Signatures]