Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 29 January 2015 [1]

Case C-649/13

Comité d'entreprise de Nortel Networks SA and Others
v
Mr Rogeau, liquidator of Nortel Networks SA
and
Mr Rogeau, liquidator of Nortel Networks SA
v
Alan Robert Bloom,
Alan Michael Hudson,
Stephen John Harris,
Christopher John Wilkinson Hill
(Request for a preliminary ruling

from the tribunal de commerce de Versailles (France))

(Judicial cooperation in civil matters — Insolvency proceedings — Regulation No 1346/2000 — Secondary insolvency proceedings — Jurisdiction to determine the scope of the effects of secondary insolvency proceedings — Exclusive or concurrent jurisdiction — Determination of the applicable law — Proceeds from the sale of the debtor's assets held in an escrow account in a third country)

1. The request for a preliminary ruling in this case concerns Articles 2(g), 3 and 27 of Regulation (EC) No 1346/2000 [2] ('the regulation') and raises a difficult question concerning the division of jurisdiction between the courts of the State in which the main insolvency proceedings have been opened under Article 3(1) of the regulation and the courts of the State in which secondary proceedings have been opened under Article 3(2) thereof and also concerning the allocation of the insolvent debtor's assets between those two sets of proceedings.

2. The proceedings before the referring court relate to the European part of the collapse of the Canadian Nortel group, a global operator in the telecommunications sector until 2008, which gave rise to the opening of main insolvency proceedings in the United Kingdom, in respect of all the European subsidiaries in the group, and secondary proceedings in France, before the referring court, in respect of the French subsidiary.

1 — Original language: French.

2 — Council Regulation of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

I – **Legal context**

3. The regulation establishes a European framework for cross-border insolvency proceedings. Article 2(g) provides:

'For the purposes of this Regulation:

…

(g) "the Member State in which assets are situated" shall mean, in the case of:

— tangible property, the Member State within the territory of which the property is situated,

— property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

— claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1)'.

4. Article 3 of the regulation, entitled 'International jurisdiction', provides in paragraphs 1 and 2 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.'

5. In Chapter III, entitled 'Secondary insolvency proceedings', Article 27 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.'

II – **The facts giving rise to the proceedings before the referring court, the proceedings before the referring court and the question referred for a preliminary ruling**

6. The facts giving rise to the proceedings before the referring court, as set out in the order for reference and the case file, may be summarised as follows.

7. The Nortel group, whose parent company, Nortel Networks Corporation, is Canadian, was one of the world's leading providers of telecommunications network solutions. The Canadian company Nortel Networks Limited ('NNL'), a direct subsidiary of Nortel Networks Corporation, held the majority of the Nortel group's worldwide subsidiaries, including Nortel Networks SA ('NNSA'), a company incorporated under French law.

8. The Nortel group engaged in extensive research and development (R&D) activities, which it pursued through specialist subsidiaries ('the R&D centres'). NNSA was one of those subsidiaries. Almost all the intellectual property resulting from the group's research and development activities was registered (mainly in North America) in the name of NNL, as the legal owner. NNL granted the R&D centres free exclusive licences to exploit the group's intellectual property. The R&D centres also retained beneficial ownership of that intellectual property, in a proportion based on their respective contributions to the research and development activities. An intra-group agreement, known as the Master R&D Agreement ('the MRDA'), organised the legal relationships between NNL and the R&D centres. [3] That agreement provided, inter alia, that, depending on the profit or loss made at group level in a given financial year, each R&D centre would either have a claim against NNL in respect of, or be liable to pay it, a sum known as 'RPS' (Revenue Profit Sharing).

9. Since the Nortel group was experiencing serious financial difficulties in 2008, its executives decided, in order to optimise the sale of assets at group level, to arrange for the opening of insolvency proceedings simultaneously in Canada, the United States and the European Union.

10. By order of 14 January 2009, the High Court of Justice of England and Wales, Chancery Division, opened main insolvency proceedings under English law in respect of all the companies in the Nortel group situated in the European Union, including NNSA, pursuant to Article 3(1) of the regulation, and appointed Mr Bloom, Mr Hudson, Mr Harris and Mr Wilkinson Hill as joint administrators (collectively, 'the joint administrators').

11. Following a joint application lodged by NNSA and the joint administrators, by judgment of 28 May 2009 the referring court opened secondary proceedings for compulsory liquidation, as provided for in Article 27 of the regulation, in respect of NNSA, authorised continued trading for a specified period and appointed Mr Rogeau as liquidator.

12. Industrial action began at NNSA on 7 July 2009 and was brought to an end on 21 July 2009 by the signing of a memorandum of agreement settling the action ('the memorandum settling the action') by NNSA (represented by the persons responsible for the secondary insolvency proceedings, the trade union organisations), the comité d'entreprise (works council) of NNSA and representatives of the striking employees. That agreement provided for the making of a severance payment, of which one part was payable immediately and another part, known as 'the deferred severance payment' ('the deferred SP'), was to be paid, once operations had ceased, out of available funds arising from any sale of a branch of activity or of assets, from any distribution in respect of the sale of assets or, more generally, from recovered assets or debts, after full payment of all the operating liabilities arising from the continued trading under the main and secondary proceedings and of the 'administration expenses'. It was provided that the amount of the deferred SP would depend on the amount of funds available. On 18 August 2009, an agreement additional to the memorandum settling the action, incorporating the terms of the latter, was signed by the joint administrators ('the additional agreement').

13. On 1 July 2009, a protocol coordinating the main and secondary proceedings was signed by the persons responsible for the two sets of proceedings ('the coordinating protocol'). Article 8.3 of that protocol states that, 'in accordance with [the r]egulation …, the administration expenses shall be paid in full, when they normally fall due and in priority, out of the company's assets wherever those assets may be situated (including those situated in France), notwithstanding the opening of the secondary proceedings'. Following the signing of the memorandum settling the action, the administrators in the main and secondary proceedings signed an agreement dated 18 August 2009 supplementing the coordinating protocol, which, under Article 7 thereof, takes precedence over that protocol.

3 — NNSA became a party to the MRDA when it signed the agreement on 22 December 2004.

14. By judgment of 24 September 2009, the referring court approved the coordinating protocol, the memorandum settling the action and the additional agreement.

15. In order to secure a better price for the Nortel group's assets, the liquidators in the various insolvency proceedings throughout the world agreed that those assets would be sold on a global basis, by branch of activity. An agreement to that effect, entitled 'Interim Funding and Settlement Agreement' ('the IFSA'), was concluded on 9 June 2009 between NNL and several of the group's subsidiaries. In that agreement, it was agreed, inter alia, that the MRDA would continue to apply throughout the entire duration of the insolvency proceedings, that NNL's subsidiaries would at the appropriate time waive their industrial and intellectual property rights relating to the activities being sold (on the understanding that each one would continue to enjoy the rights under their licences until the liquidation/disposal operations were completed and that such waivers would not entail a waiver of their rights as beneficial owner of the group's intellectual property), that all the proceeds from the sale of the group's assets at world level would be placed in escrow accounts in the United States ('the Lockbox') and that none of the sums held in those accounts could be distributed outside an agreement concluded by all the relevant entities in the group. NNSA became a party to the IFSA by means of an accession agreement (Amendment and Accession Agreement) concluded on 11 September 2009. [4] The sale of NNSA's activities took place as part of the worldwide sales organised in accordance with the IFSA. The proceeds from the sales in which NNSA was involved (around USD 7.2 billion) are in the Lockbox and no agreement has yet been reached concerning their distribution. By order of the insolvency judge in the secondary proceedings, Mr Rogeau was authorised to take any action necessary for carrying out the sales operations (for example, the termination of licences connected with the activities being sold) and also to participate in negotiations for the purpose of distributing the proceeds from the sales.

16. The annual report drawn up by Mr Rogeau on 23 November 2010 showed a credit balance of EUR 38 980 313 in the bank accounts of NNSA as at 30 September 2010, and it was accordingly possible to consider making a first disbursement of the deferred SP from May 2011. In the absence of such payment, a notice to proceed was sent to Mr Rogeau by the works council of NNSA on 5 May 2011. In a letter dated 18 May 2011, Mr Rogeau informed the works council of NNSA that he was unable to give effect to the terms of the memorandum settling the action, because the cash-flow forecast drawn up by Ernst & Young on 13 May 2011 showed a deficit of nearly EUR 6 million as a result of two requests for payment from the joint administrators for EUR 16.6 million. [5] Moreover, there was also the matter of a claim from the UK pension fund, which had been classified as an administration expense under English law by judgment of 10 December 2010 of the High Court of Justice of England and Wales, Chancery Division.

4 — The signing of that agreement was authorised by order of the insolvency judge of 7 July 2009.

5 — This was broken down as follows: around EUR 8 million under the 2010 Residual Profit Sharing ('the RPS 2010') and EUR 8.6 million paid by the joint administrators in respect of NNSA's share of costs arising from the sale of the group's assets in the EMEA (Europe Middle East Africa) region, that is to say around 25%.

17. Contesting that state of affairs, on 7 June 2011 the works council of NNSA and 147 former NNSA employees brought proceedings against Mr Rogeau before the referring court, seeking a declaration in particular that the secondary proceedings relating to NNSA have an exclusive and direct right over a share of the overall proceeds from the sale of the Nortel group's assets and an order requiring Mr Rogeau to make immediate payment to the applicants in respect of the claim for their deferred SP, to the extent of the funds available to NNSA, and also of the balance of that claim on receipt by the secondary proceedings of the share of the overall sale proceeds falling to NNSA. [6]

18. On 1 August 2011, Mr Rogeau applied to join the joint administrators as third parties before the referring court, on the ground that, by taking control of the proceeds from the sale of NNSA's assets carried out in France that were held in the 'Lockbox', they were preventing disbursement by him of the deferred SP. When they appeared at the hearing on 23 February 2012 and then at the hearing on 24 May 2012, the joint administrators requested that the referring court, inter alia, decline international jurisdiction, in favour of the High Court of Justice of England and Wales, Chancery Division, to make against them any decision which would have the effect of limiting, directly or indirectly, the scope of the main proceedings and/or their powers — including their right to take control of the sums currently frozen in the Lockbox — and to give a ruling that the secondary proceedings in respect of NNSA have any right over all or part of the proceeds of the global sales of the assets of the Nortel group in which NNSA has been involved that are currently frozen in the Lockbox. In the alternative, the joint administrators requested that the referring court decline jurisdiction to rule in relation to the assets and rights which were not situated in France for the purposes of Article 2(g) of the regulation when the judgment opening the secondary proceedings was delivered and also to rule on any claim which, directly or indirectly, would involve the referring court ruling on any debts of NNSA which may be classified as administration expenses under English law.

19. The referring court observes that the document instituting the proceedings that have been brought before it was explicitly issued within the area of the law on collective insolvency proceedings and of the regulation and that therefore the provisions of the latter should be applied. It explains that, in order to rule on the claims before it, it must first of all rule on its jurisdiction to determine the scope of the effects of the secondary proceedings and that that decision depends on its interpretation of various articles of the regulation and, in particular, Article 2(g) thereof, which contains uniform rules on determining the location of the debtor's assets. It also considers that it will be required to decide whether the effects of secondary proceedings may extend to the debtor's assets situated outside the European Union.

20. In those circumstances, the tribunal de commerce de Versailles (Commercial Court, Versailles) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the courts of the State in which secondary proceedings have been opened have exclusive jurisdiction, or concurrent jurisdiction with the courts of the State in which the main proceedings have been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of the secondary proceedings in accordance with Articles 2(g), 3(2) and 27 of [the r]egulation … and, in the event that there is exclusive or concurrent jurisdiction, is the applicable law that of the main proceedings or of the secondary proceedings?'

6 — It is apparent from the summons that the works council of NNSA and the former NNSA employees are contesting the payment of EUR 8 million under the RPS 2010 on the basis of an arrangement contained in the memorandum settling the action, which set the balance of any payment under Revenue Profit Sharing at an overall sum of USD 4.9 million. They also dispute that losses linked to the continuation of the MRDA system, resulting from the delay in the process of selling the Nortel group's assets at world level, can be imputed to NNSA and argue that the RPS 2010 is conditional and not yet enforceable. Regarding the claim for the reimbursement of sales costs, they argue that the claim will be justified only if and when the secondary proceedings receive the share of the overall sale proceeds falling to NNSA and, consequently, does not preclude disbursement of the deferred SP out of the sums currently available from those proceedings. Lastly, regarding the UK pension fund claim, they consider that the fact that that claim has been classified as an 'administration expense' under English law has no impact on the secondary proceedings, since the payment of claims under those proceedings must be based on French law.

III – **Analysis**

21. The question referred for a preliminary ruling consists of two parts, the first concerning the division of jurisdiction between the courts hearing the main proceedings and those hearing the secondary proceedings and the second concerning the law applicable to determination of the location of the debtor's assets. Those two parts will be examined separately below.

A – *The first part of the question referred for a preliminary ruling: jurisdiction*

1. Preliminary observations: application of the regulation *ratione materiae*

22. Although neither the referring court nor the interested parties who submitted written observations have expressed any doubts as to the fact that, in circumstances such as those of the proceedings before the referring court, jurisdiction must be determined on the basis of the provisions of the regulation and not those of Regulation (EC) No 44/2001,[7] the question of which of the two regulations is applicable in the present case was nevertheless discussed at the hearing, following a request made by the Court. It should therefore be addressed briefly before the question referred for a preliminary ruling is analysed.

23. It is settled case-law that the regulation and Regulation No 44/2001 must be interpreted in such a way as to avoid any overlap between the rules of law that those instruments lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the scope of that regulation in so far as they come under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of the regulation. Correspondingly, actions which fall outside the scope of Article 3(1) of the regulation fall within the scope of Regulation No 44/2001.[8] The Court has also held that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation No 44/2001. Consequently, only those actions fall within the scope of Regulation No 1346/2000.[9] In the judgment in *Nickel & Goeldner Spedition* (EU:C:2014:2145, paragraph 27), the Court stated that the decisive criterion for identifying the area within which an action falls is not the procedural context of that action, but its legal basis. According to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.

24. In the present case, the works council of NNSA and the former NNSA employees are claiming payment of a debt which, although its source is to be found in the memorandum settling the action, depends, as regards its arising, its enforceability and the actual sum involved, on the funds available in the secondary proceedings once NNSA's assets have been liquidated.

25. The purpose of the action before the referring court is therefore, first, as regards the funds already accrued to the secondary proceedings, to assert the preferential status of the deferred SP debt, as a claim for wages and salaries, vis-à-vis the claims made by the persons responsible for the main insolvency proceedings and, secondly, as regards the funds not yet accrued to the secondary proceedings, to claim the right of those proceedings over the share falling to NNSA of the proceeds from the sale of the Nortel group's activities/assets held in the Lockbox.

7 — Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1). Only the observations submitted by the joint administrators addressed that matter, but they concluded that Regulation No 44/2001 was not applicable.

8 — See judgments in *F-Tex* (C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48) and *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 22).

9 — See judgments in *F-Tex* (EU:C:2012:215, paragraphs 23 and 29) and *Nickel & Goeldner Spedition* (EU:C:2014:2145, paragraph 23).

26. The first part of the action is based on the provisions of French law governing creditors' rights during judicial liquidation proceedings and, in particular, on Article L 641-13 of the Commercial Code, which defines the order for payment of claims. The fact that, in order to define the nature of the claims referred to by the persons responsible for the main insolvency proceedings, the referring court may, as the case may be, be required to refer to one or more agreements, such as the RPS 2010, the IFSA or the coordinating protocol, does not call into question the legal basis for the first part of the action brought by the works council of NNSA and the former NNSA employees, which is to be found *in the provisions of French law relating to judicial liquidation proceedings*. Moreover, I note that, in the coordinating protocol, the concept of 'administration expenses' is defined by reference to paragraph 99 of Schedule B1 to the Insolvency Act 1986, which is applicable to the main insolvency proceedings, and the preferential status of the claims arising from such expenses is asserted by reference to English law and to the regulation and the European Communication and Cooperation Guidelines for Cross-border Insolvency published by INSOL Europe in July 2007, guidelines which, under the terms of point 2 of that protocol, form an integral part thereof.[10] It follows that, even assuming that the referring court is required to settle the matter placed before it in the first part of the main action on the basis of that protocol, it would in any event be required to apply *the rules of law specific to insolvency proceedings*.

27. The second part of the action before the referring court is based first of all on the provisions of the regulation. As the referring court itself points out, in order to establish whether the works council of NNSA and the former NNSA employees are justified in claiming the right of the secondary proceedings to the share falling to NNSA of the proceeds from the sale of the Nortel group's assets that are held in the Lockbox, that court has to establish the scope of the effects of those proceedings, which, under Article 3(2) and Article 27 of the regulation, are restricted to the assets of NNSA situated within French territory. The objection of lack of jurisdiction raised by the joint administrators is attached to this second part of the action, that objection itself being based on the provisions of the regulation and the respective roles assigned to the main proceedings and secondary proceedings in the scheme of the regulation. The fact that, in the present case, coordination between those two sets of proceedings has been formalised in a contractual document signed by the persons responsible for both sets of proceedings in no way alters the nature of and the legal basis for the second part of the action before the referring court. The claims made by the liquidator in the secondary proceedings and also by the works council of NNSA and the former NNSA employees — who, moreover, are not parties to the coordinating protocol — in respect of the share of the funds held in the Lockbox and falling to NNSA *have no contractual basis*, and nor do the arguments put forward by the persons responsible for the main insolvency proceedings in support of their objection of lack of jurisdiction.

28. Moreover, it is to be noted that the purpose of the coordinating protocol is to govern the actions of the 'parties having an interest in the coordination of the main proceedings and the secondary proceedings' (point 1). Its aims are, inter alia, to ensure that the proceedings are administered in an orderly, effective, efficient and proper manner, to secure the best price for NNSA's assets by selling them on a global basis, to share information and to keep disputes and costs to a minimum (point 4(i) to (iv)), and also to define the terms and conditions under which NNSA will continue trading during the course of the secondary proceedings (point 4(v)). Although point 5.3 of that protocol lays down the principles on the basis of which the joint administrators, in collaboration with the liquidator in the secondary proceedings, will negotiate the distribution of the proceeds from the sale of the Nortel group's assets amongst the various entities involved, including NNSA,[11] on the other hand, *none of its provisions defines the criteria for the distribution of the share falling to NNSA between the main and*

10 — See point 8 of the coordinating protocol.

11 — According to that provision of the protocol, the parties agreed to claim on behalf of NNSA the right to 9% of the proceeds from the sale of all of the group's intellectual property rights.

secondary proceedings.[12] In addition, the question of the distribution of the proceeds from the sale of NNSA's assets between the two sets of insolvency proceedings can be distinguished from and arises at an earlier stage than the question of which expenses in the main proceedings are to be regarded as 'administration expenses' and of the extent to which they enjoy a preferential status that may be relied on against creditors in the secondary proceedings, including the NNSA employees, on the basis of the applicable law and/or contractual stipulations contained in the coordinating protocol.

29. It follows from all the above considerations that the dispute between, first, the persons responsible for the main insolvency proceedings and, second, the liquidator in the secondary proceedings, the works council of NNSA and the NNSA employees in the case before the referring court falls within the scope of the regulation for the purposes of the case-law of the Court cited in point 23 above. Such a conclusion is not invalidated by the fact that certain aspects of the relations between the various parties to the case before the referring court are governed by agreements between them (the memorandum settling the action and the coordinating protocol) and that the extent of the respective rights which those parties are claiming may vary as a result of agreements between some of them and third parties (the RPS 2010 and the IFSA), since that circumstance is not such as to call into question the legal basis for their claims against each other and, moreover, all those agreements fall within the context of NNSA's insolvency[13] and the operations connected with its liquidation.

2. Analysis of the first part of the question referred for a preliminary ruling

a) The rules on jurisdiction laid down by the regulation and those introduced by the case-law

30. It should first of all be pointed out that the regulation expressly determines jurisdiction only to *open* insolvency proceedings. Under Article 3(1) of the regulation, that jurisdiction lies with the courts of the Member State within the territory of which the centre of a debtor's main interests is situated. Under Article 3(2), the courts of a Member State other than that within the territory of which the centre of a debtor's main interests is situated, and in the territory of which the latter possesses an establishment, have jurisdiction to open *territorial* insolvency *proceedings*, that is to say, proceedings restricted to the assets of the debtor situated in the territory of the latter Member State.

31. An additional rule on jurisdiction was introduced into the scheme of the regulation by the judgment in *Seagon* (C-339/07, EU:C:2009:83), in which the Court held that Article 3(1) of the regulation must be interpreted as also conferring international jurisdiction on the Member State within the territory of which insolvency proceedings have been opened to hear and determine actions which derive directly from those proceedings and which are closely connected to them.[14]

12 — In that regard, under the heading 'Recovery of assets/Distribution of proceeds from sales', point 6.1 of that protocol simply states that 'unless otherwise agreed in writing, the assets of [NNSA] shall be realised and recovered by the joint administrators, the French administrator and the French liquidator in accordance with the regulation'. Even supposing that it is possible to derogate from the provisions of the regulation concerning the respective effects of the main and secondary proceedings, it is not apparent from the documents before the Court that such an agreement was entered into.

13 — In that regard, it should be borne in mind that the regulation itself refers to the need to ensure coordination between the main proceedings and one or more sets of secondary proceedings and that, in the present case, the conclusion of an agreement for that purpose was requested by the referring court.

14 — Paragraphs 21 and 28 and operative part. The action at issue in the judgment in *Seagon* (EU:C:2009:83) was an action to set a transaction aside. See also the judgment in *F-Tex* (EU:C:2012:215, paragraphs 27 and 28), in which the Court however held that, in view of the nature of the main action, it fell within the scope of the regulation. The principle established in the judgment in *Seagon* (EU:C:2009:83) was recently reaffirmed by the Court in relation to an action to establish liability brought against the managing director of the debtor company, seeking reimbursement of payments made after the company became insolvent or after it had been established that its liabilities exceeded its assets (see judgment in *H*, C-295/13, EU:C:2014:2410).

32. Like several interested parties who have submitted observations in the present proceedings, including the European Commission, I consider that a similar interpretation should be given to Article 3(2) of the regulation and that, consequently, the rule on jurisdiction stated by the Court in the judgment in *Seagon* (EU:C:2009:83), based on *vis attractiva concursus*, can also apply in favour of the courts of the Member State in which secondary proceedings have been opened. It seems to me that this conclusion follows from consideration of the same factors as the Court relied on in inferring that rule from the scheme of the regulation and its objectives. First, recital 6 in the preamble to the regulation, according to which the latter 'should be confined to provisions governing jurisdiction for opening insolvency proceedings and *judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings*',[15] refers without distinction to any proceedings opened under the regulation, without differentiating between main, territorial or secondary proceedings. Secondly, pursuit of the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, referred to in recitals 2 and 8 of the regulation, and the aim of avoiding incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping), referred to in recital 4 of the regulation, would also be weakened if the courts of the Member State in which secondary proceedings have been opened did not have jurisdiction to hear and determine actions deriving from and closely connected to those proceedings, such as actions claiming sums of money or assets of the secondary proceedings. In addition, an interpretation of Article 3(2) of the regulation similar to that given by the Court in respect of Article 3(1) in the judgment in *Seagon* (EU:C:2009:83) is confirmed, as the Court correspondingly held in paragraphs 25 and 26 of that judgment, by the first subparagraph of Article 25(1) of the regulation. That provision establishes an obligation to recognise *judgments* handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 of the regulation and *which concern the course* and closure of insolvency proceedings. Article 16 refers to judgments handed down 'by a court of a Member State which has jurisdiction pursuant to Article 3', namely both a court having jurisdiction under Article 3(1) and a court having jurisdiction under Article 3(2).

33. It is certainly true, as the joint administrators state in their written observations, that the judgment in *Seagon* (EU:C:2009:83) enshrines 'a principle of centralisation of jurisdiction with courts of the Member State in which *the main proceedings* have been opened'.[16] However, in the scheme of the Court's reasoning, that principle is intended to apply only in respect of actions which 'derive directly from *those proceedings* and which are closely connected to them'.[17] On the other hand, there is nothing in that judgment that would lead to the conclusion that that principle extends so far as also to include actions derived directly from and closely connected with *secondary proceedings*. As I have explained in the previous point, the grounds on which that judgment is based are liable to lead to the same interpretation of Article 3(2) of the regulation as that given by the Court in respect of Article 3(1). Those grounds are, moreover, 'neutral' as regards the division of jurisdiction between main and secondary proceedings: in no part of that judgment does the Court, in order to support its interpretation, rely on the universal nature of the main proceedings or argue that the main proceedings take precedence over secondary proceedings.[18]

15 — Emphasis added.

16 — Paragraph 104 of the observations of the joint administrators. Emphasis added.

17 — Paragraphs 21 and 28 and operative part of the judgment in *Seagon* (EU:C:2009:83), emphasis added.

18 — The fact that, as the joint administrators point out in their written observations, the Court disregarded the suggestion made by Advocate General Ruiz-Jarabo Colomer in points 64 to 69 of his Opinion in *Seagon* (C-339/07, EU:C:2008:575), that it should recognise the 'relatively exclusive' nature of the jurisdiction of the courts of the Member State in which the main proceedings have been opened in respect of actions to set a transaction aside by virtue of insolvency, thus leaving the liquidator to choose the forum which, in his opinion, is most suitable for protecting the assets, does not, contrary to what the joint administrators seem to imply, enable any conclusions to be drawn concerning recognition of the jurisdiction of the courts of the Member State in which secondary proceedings have been opened to hear and determine such actions where they derive from those proceedings and are closely connected with them.

34. Lastly, for the sake of completeness, I would point out that both the report 'External Evaluation of Regulation No 1346/2000/EC on Insolvency Proceedings' ('the Heidelberg-Luxembourg-Vienna Report') [19] and the proposal for a regulation of the European Parliament and of the Council amending Regulation No 1346/2000, presented by the Commission on 12 December 2012 [20] ('the proposal for amending the regulation'), recommend the codification of the principle of *vis attractiva concursus* in respect of related actions and its application in favour of the courts hearing the proceedings with which those actions are connected, whether these are main, territorial or secondary insolvency proceedings. [21]

35. The rule on jurisdiction adopted in the judgement in *Seagon* (EU:C:2009:83) in a context exclusively internal to the European Union was extended in the judgment in *Schmid* (C-328/12 EU:C:2014:6) to disputes involving *connecting factors with a third State*. Emphasising the objectives of foreseeability as regards bankruptcy and liquidation jurisdiction pursued by Article 3(1) of the regulation and having rejected the arguments put forward by the German Government, relating inter alia to a departure from the principle that the courts of the defendant's place of residence should have jurisdiction and to the risk of failure to recognise a judgment, the Court held in that judgment that the aforementioned provision 'also creates jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person *whose place of residence is in a third country*'. [22] Contrary to what the United Kingdom Government argues in its written observations, it is my view that the same interpretation, which simply extends the territorial scope of the principle of *vis attractiva concursus* as recognised in the judgment in *Seagon* (EU:C:2009:83), could also be applied in respect of Article 3(2) of the regulation. That provision pursues the same aims of foreseeability as regards jurisdiction and of legal certainty that are referred to by the Court in respect of Article 3(1). Those aims, and also the aims of simplifying and ensuring the effectiveness of proceedings and reducing incentives for forum shopping, already highlighted by the Court in the judgment in *Seagon* (EU:C:2009:83), support granting to the courts of the State in which secondary proceedings have been opened jurisdiction to hear and determine an action to set a transaction aside or another action arising from the insolvency which is derived directly from those proceedings and is closely connected to them (for example, because it seeks to reincorporate into the debtor's estate an asset which, prior to its disposal, was situated within the territory of that Member State), *regardless* of whether the defendant is resident in a Member State or in a third State.

36. More generally, the judgment in *Schmid* (EU:C:2014:6), following the approach taken in the judgment in *Owusu* (C-281/02, EU:C:2005:120) delivered in the context of the Brussels Convention, [23] interpreted the geographical scope of the regulation in broad terms, extending it beyond solely 'European' cross-border insolvency proceedings and including both those characterised by foreign elements situated both inside and outside the territory of the European Union and purely 'international' proceedings, in which any foreign element is situated outside the European Union. The solution adopted by the Court in that judgment means that, where the centre of a debtor's main

19 — Published in Hess, B., Oberhammer, P., and Pfeiffer, T., *European Insolvency Law, The Heidelberg-Luxembourg-Vienna Report on the Application of Regulation No 1346/2000/EC on Insolvency Proceedings*, Beck-Hart-Nomos, C.H., Munich/Oxford, 2014.

20 — COM(2012) 744 final.

21 — See point 2.5.2 and p. 220 of the Heidelberg-Luxembourg-Vienna Report and the Commission's proposal to add to the regulation a new Article 3a entitled 'Jurisdiction for related actions', paragraph 1 of which provides that: '[t]he courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them'.

22 — Paragraph 33, emphasis added. See also judgment in *H* (EU:C:2014:2410).

23 — Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed on 27 September 1968 (OJ 1978 L 304, p. 36).

interests is situated in a Member State, the provisions of the regulation should apply, in relations between Member States, to the entire insolvency proceedings, including aspects of those proceedings in which there are factors connecting them with a third State,[24] excluding the Member States' provisions of private international law.

37. Such a finding makes it possible to dispel the doubts expressed by the referring court regarding the applicability of the regulation in circumstances such as those in the case before it, where the proceeds from the sale of the debtor's assets are held in an escrow account in the United States and therefore outside the territory of the European Union. It also makes it possible to reject the argument put forward by the works council of NNSA to the effect that, if it were to be found that, on the basis of the provisions of the regulation, NNSA's assets are to be regarded as situated outside the European Union,[25] the rules of French private international law should be applied, under which the proceedings opened in France in respect of NNSA would have universal effect and would therefore extend to those assets. The application of such rules, which would moreover extend the effects of secondary proceedings — which are by nature territorial — beyond the limits imposed by the regulation, is precluded in the light of the judgment in *Schmid* (EU:C:2014:6).

b) The relationship between main proceedings and secondary proceedings in the scheme of the regulation

38. At this point, it is necessary to examine the respective roles played by main proceedings and secondary proceedings and the relationship between them in the scheme of the regulation.

39. As may be seen from the preamble thereto, in particular from recital 11, the regulation is based on the principles of the universality and unity of insolvency proceedings, although their application was deliberately moderated by the Community legislature by permitting the opening of national proceedings having territorial scope concurrently with main proceedings which are intended to be universal. The reasons for such a choice are to be found, apart from in the considerable differences between the substantive law of the Member States, which made it inadvisable to introduce single insolvency proceedings and the application without exception of the law of the State in which those proceedings are opened (see recital 8 of the regulation), in the need to protect the interests of local creditors and to facilitate the administration of complex estates (see recital 19 of the regulation). This led to the establishment in the regulation of two different criteria for determining jurisdiction, namely that based on the centre of the debtor's main interests, which determines the courts having jurisdiction to open main proceedings, and that based on an establishment, which permits the opening of secondary proceedings.

40. The choice made by the Community legislature to permit the opening of territorial proceedings certainly makes the system more flexible: the opening of one or more sets of such proceedings may, for example, prove particularly useful in cases such as that before the referring court where proceedings are opened in respect of the various subsidiaries of a group of companies in the Member State of the centre of main interests, but where the bulk of the assets, employees or creditors of one or more of those subsidiaries is situated in a different Member State.

24 — Such a connecting factor may be the place of residence of the defendant in an action related to the insolvency proceedings, as in the case which gave rise to the judgment in *Schmid* (EU:C:2014:6), or other factors, such as the place of residence of creditors or the place where the debtor's assets are situated. The effects of proceedings opened on the basis of the regulation on relations with third States will depend on the law applicable in the third State and the treaties in force between that State and the State in which the proceedings are being conducted.

25 — When the secondary proceedings were opened, see point 64 et seq. of this Opinion.

41. However, such a choice also introduces a degree of complexity, in that it allows the same debtor to be the subject of several concurrent sets of proceedings. It is true that, in the scheme of the regulation, secondary proceedings are restricted in various ways, both from the procedural and from the substantive point of view. They require, in principle, that main proceedings to which they may be attached have been opened,[26] they may only be winding-up proceedings (Article 3(3) of the regulation) and their effects are restricted to the assets of the debtor situated in the territory of the State in which they have been opened (Articles 3(2) and 27 of the regulation). None the less, the existence of concurrent sets of proceedings may be a source of inefficiencies in the absence of rules allowing for the management of the difficulties to which such a situation may give rise.

42. To that end, the regulation lays down *minimum coordinating rules*, which are designed to encourage the conduct of proceedings in a harmonious manner, conducive to the efficient management and effective realisation of the assets. Those rules establish, inter alia, *a duty to cooperate with and communicate information to each other* on the part of the liquidators in the various sets of proceedings[27] and provide for mechanisms designed to ensure equal treatment of creditors[28] and to determine what is to be done with any surplus assets in the secondary proceedings.[29] Improved cooperation in order to ensure more efficient administration of parallel insolvency proceedings is, moreover, one of the main objectives of the proposal for amending the regulation submitted by the Commission.[30]

43. The relationship between main and secondary proceedings is therefore founded on a *requirement of cooperation*, which is designed to ensure that the priority objectives of efficiency and effectiveness are achieved even where there are several sets of proceedings. In that context, the regulation assigns a *dominant* role to the main proceedings, the liquidator in which is given several possibilities for intervening in one or more sets of secondary insolvency proceedings which are pending at the same time, for example by proposing a restructuring plan or composition or by applying for realisation of the assets in the secondary insolvency proceedings to be suspended.[31]

44. Subject to respect for that role and the obligation concerning coordination, the regulation attributes to secondary proceedings, if not genuine autonomy, at least their own sphere of action. They have a scope different from that of the main proceedings, are designed to protect specific interests and are subject to rules which, in a number of respects, are similar to those applying to the main proceedings. Thus, in the same way as a judgment opening proceedings under Article 3(1) of the regulation, a judgment opening secondary proceedings is automatically recognised in all the Member States pursuant to Article 16 of the regulation and, under Article 17(2), the effects of such proceedings may not be challenged in other Member States. Similarly, under Article 25(1) of the regulation, judgments which are handed down by a court that has opened such proceedings and which concern the course and closure of those proceedings, judgments which derive directly from those proceedings and which are closely connected with them, or a composition approved by that court, are also to be recognised with no further formalities. Under Articles 4 and 28 of the regulation,

26 — The opening of territorial proceedings before main proceedings have been opened is limited to what is absolutely necessary, see recital 17 and Article 3(4) of the regulation.

27 — See recital 20 and Article 31(1) and (2) of the regulation.

28 — See Article 20(2) of the regulation.

29 — See Article 35 of the regulation.

30 — The new rules should, inter alia, make it possible to prevent the opening of secondary proceedings which are not necessary to protect the interests of local creditors where, via contractual agreements, the liquidator in the main proceedings ensures that local creditors will receive the treatment that they would have received if secondary proceedings had been opened (see the new Article 29a(2), referred to in Article 1(34) of the proposal for amending the regulation). It is also proposed to abolish the requirement that secondary proceedings may only be winding-up proceedings, so that they may be coordinated with main proceedings in which the aim is to rescue the undertaking (see Article 1(22) of the proposal for amending the regulation, which amends Article 3(3) thereof), and to extend the requirements concerning cooperation to the courts having jurisdiction (see the new Article 31a, referred to in Article 1(36) of the proposal for amending the regulation).

31 — See recital 20 and Articles 31(3), 33 and 34(1) and (3) of the regulation. Moreover, those powers are subsequently increased in the proposal for amending the regulation, which grants the liquidator in the main proceedings the power to oppose the very opening of secondary proceedings (see the new Article 29a(2), referred to in Article 1(34) of the proposal for amending the regulation).

as with proceedings under Article 3(1) thereof, secondary proceedings are governed by the law of the Member State within the territory of which they have been opened. Lastly, under Article 18(2) of the regulation, liquidators in secondary proceedings may independently bring actions claiming assets falling within the scope of those proceedings that have been removed to the territory of another Member State and also any action to set aside which is in the interests of the creditors.

45. In addition, it follows from the choice made by the Community legislature to permit the opening of proceedings parallel to the main proceedings and from the reasons underlying that choice, which are set out in the preamble to the regulation, that the opening of such proceedings *restricts the effects of the main proceedings*. The same applies to the powers of the liquidators in the latter proceedings, as indeed clearly follows from Article 18(1) of the regulation, according to which '[t]he liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, *as long as no other insolvency proceedings have been opened there* nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State'. [32]

c) Determination of the court having jurisdiction to define the scope of the effects of secondary proceedings

46. The first part of the question referred for a preliminary ruling by the tribunal de commerce de Versailles, which is essentially concerned with determining whether that court, as a court that has opened secondary proceedings under Article 3(2) of the regulation in respect of NNSA, also has jurisdiction on the basis of the regulation to define the scope of the effects of those proceedings, needs to be answered in the light of the observations set out in sections (a) and (b) above. In my view, it follows both from the relationship between main and secondary proceedings established by the regulation and from the objectives that the regulation assigns to secondary proceedings and, more generally, the objectives pursued by the regulation that that question must be answered in the affirmative.

47. First of all, as I have pointed out above, despite the universal nature and the dominant role assigned to the main proceedings and the subordinate nature of secondary proceedings, in the scheme of the regulation the latter proceedings still have their own sphere of action, necessary for pursuit of the objectives assigned to them and of their function, assigned in the scheme of the regulation, of restricting application of the principle that insolvency proceedings have universal effect. [33] In my view, it would not be compatible with such a framework to conclude that the court that has jurisdiction to open secondary proceedings does not have jurisdiction to determine, on the basis of the provisions of the regulation, the scope of the effects of those proceedings.

48. Secondly, it should be borne in mind that, under Articles 3(2) and 27 of the regulation, the effects of secondary proceedings are restricted to the assets of the debtor situated in the territory of the Member State where those proceedings have been opened. As Mr Rogeau points out in his written observations, a court of a Member State which receives a request to open secondary proceedings must, in order to ascertain whether the conditions allowing it jurisdiction under Article 3(2) of the regulation are fulfilled, verify whether the debtor's assets situated within the territory of that Member

32 — Emphasis added.

33 — See, to that effect, judgment in *MG Probud Gdynia* (C-444/07, EU:C:2010:24, paragraph 24). See also the Heidelberg-Luxembourg-Vienna Report, p. 111.

States are such that it may be concluded that he possesses an 'establishment' there within the meaning of Article 2(h) of the regulation.[34] It follows that, even prior to the opening of secondary proceedings, that court is required to identify within the territory of the Member State concerned at least a part of the aforesaid assets to which the effects of those proceedings are deemed to apply.

49. Thirdly, this process of identifying elements of the debtor's estate situated within the territory of the Member State where secondary proceedings are opened is essential not only in order to ascertain that the conditions for the opening of such proceedings are fulfilled, to define the limits of those proceedings and to define the substantive scope of the provisions of the law of the Member State in question, but also to enable the very conduct of the secondary proceedings, which are deemed to be winding-up proceedings. It follows that, as Mr Rogeau argues, in my view correctly, an action, such as that before the referring court, seeking a declaration that certain of the debtor's assets and the proceeds from the sale of those assets fall within the scope of the effects of the secondary proceedings derives directly from those proceedings and is closely connected with them, in accordance with the rule in *Seagon* (EU:C:2009:83), as interpreted in point 32 above, and therefore falls within the jurisdiction of the court that has opened those proceedings.

50. Fourthly, the objectives of ensuring efficient, effective and rapid insolvency proceedings, which justified the adoption of the regulation, cannot be adequately achieved by a solution that would require a court of a State in which secondary proceedings have been opened, on being seised of an action designed to determine the scope of the effects of those proceedings, to decline jurisdiction in favour of the court of the State in which the main proceedings have been opened and to suspend the proceedings pending a judgment from that court.

51. The points discussed above support, in my view, recognising that the courts of the Member State in which secondary proceedings have been opened have jurisdiction to hear and determine an action designed to define the scope of the effects of those proceedings. On the other hand, the opposing arguments put forward by the joint administrators and the United Kingdom of Great Britain and Northern Ireland, supporting the view that the courts of the Member State in which the main proceedings have been opened have exclusive jurisdiction, do not convince me. Those arguments are essentially based on the priority and universal scope of the main proceedings.

52. It is certainly true, as I mentioned in point 43 above, that the regulation assigns a 'dominant role' to the main proceedings. However, the effect of that priority, which is essentially designed to ensure optimum coordination between the main and secondary proceedings by establishing their hierarchy, is not to deprive the courts hearing secondary proceedings of their powers, particularly where the matter at issue is not the delivery of judgments concerning the conduct of the process for liquidating the debtor and meeting creditors' claims or concerning the conditions under which such proceedings are to be closed, but rather the definition of the scope of those proceedings. Nor do I believe that the universality accorded to the main proceedings can serve as a decisive argument for claiming for the courts hearing those proceedings exclusive jurisdiction to determine the scope of the effects of other proceedings, although territorial and subordinate, whose opening has precisely the effect of removing part of the debtor's assets from the sole control of the main proceedings and from the law applicable to them.

53. In conclusion, it should be noted, first, that the regulation expressly lays down not only the criterion for the division of the debtor's assets between main and secondary proceedings, namely the place where they are situated, but also, as will be seen in greater detail below, substantive provisions intended to provide guidance to the courts having jurisdiction when they applying that criterion.

34 — Article 2(h) of the regulation defines the concept of 'establishment' as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods. According to the Court, that concept of 'establishment' must be interpreted as 'requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity' (see judgment in *Interedil*, C-396/09, EU:C:2011:671).

Secondly, as the Court held in the judgment in *Bank Handlowy and Adamiak* (C-116/11, EU:C:2012:739), the court having jurisdiction under Article 3(2) of the regulation has, in respect of any judgment that it may deliver, and therefore even where it is ruling on the scope of the effects of the secondary proceedings, a duty of sincere cooperation, which requires it to take account both of the objectives of the main proceedings and of the scheme of the regulation, which is based on the principle of mutual trust, the need to coordinate the main and secondary proceedings, the objective of efficient and effective cross-border insolvency proceedings and the priority of the main proceedings. [35] In those circumstances, the risk that that court might deliver a judgment detrimental to the interests of the main proceedings is reduced.

54. On the basis of the reasons set out above, it is my view that a court having jurisdiction under Article 3(2) of the regulation to open secondary proceedings also has jurisdiction to determine which of the debtor's assets fall within the scope of the effects of those proceedings.

d) Exclusive or concurrent jurisdiction?

55. The referring court also asks the Court whether, should it hold that the courts of the State in which secondary proceedings have been opened have jurisdiction, that jurisdiction is exclusive or concurrent with that of the courts in the Member State in which the main proceedings have been opened.

56. In that regard, I would point out that it is clear from the provisions of the regulation that the opening of secondary proceedings in the Member State where the debtor possesses an establishment has the effect of making the debtor's assets situated within the territory of that Member State subject to different legal rules from those applying to the main proceedings. Despite the fact that the secondary proceedings are subordinate to the main proceedings, and despite the mandatory rules on coordination between the two sets of proceedings and the duties of cooperation owed by the persons responsible for those proceedings, those assets are in fact removed from the sole control of the main proceedings and from the law applicable to them.

57. It follows that the judgment delivered by the court of the Member State in which the secondary proceedings have been opened which gives a ruling on the assets falling within the scope of the effects of those proceedings also rules, indirectly but inevitably, on the scope of the effects of the main proceedings. For reasons similar to those set out above, it must be recognised that the court of the Member State in which the main proceedings have been opened also has jurisdiction to determine the scope of the effects of those proceedings, in the same way as the court of the Member State in which secondary proceedings have been opened.

58. This means that any disputes concerning whether certain of the debtor's assets come under one of those sets of proceedings or the other may be brought before either one of those courts. The jurisdiction of those courts to hear and determine such disputes is therefore concurrent.

59. The joint administrators challenge such a solution, arguing that, as follows from the case-law of the Court, the regulation precludes the proliferation of concurrent fora. They base their argument most particularly on the judgment in *Rastelli Davide e C.* (C-191/10, EU:C:2011:838). [36] In that regard, I will simply point out that, in that judgment, the Court held that to allow main insolvency proceedings to be extended to an entity legally distinct from that in respect of which the proceedings have been opened, on the sole ground that their property has been intermixed, without considering where the centre of

35 — Paragraph 62. See also Opinion of Advocate General Kokott in *Bank Handlowy and Adamiak* (C-116/11, EU:C:2012:308, point 66).

36 — In paragraph 28 of that judgment, on which the joint administrators base their argument, the Court warned against a solution that would create 'a risk of conflicting claims to jurisdiction between courts of different Member States, which the regulation specifically intended to prevent in order to ensure uniform treatment of insolvency proceedings within the European Union'.

that entity's main interests is situated, would permit a circumvention of the system established by the regulation, enabling a court that does not have jurisdiction to open main proceedings under Article 3(1) of the regulation to deliver a judgment having the same effects in respect of a legal entity as a judgment opening such proceedings. In the present case, it is a question not of creating a third criterion for determining jurisdiction in addition to those referred to in Article 3 of the regulation, but simply of allowing courts designated on the basis of those criteria to have concurrent jurisdiction to hear and determine certain actions.

60. Where there are concurrent fora, there is a risk of irreconcilable judgments. As the Commission suggests, such a risk could be met by applying a rule similar to that laid down in Article 27 of Regulation No 44/2001 which, in the case of *lis pendens*, assigns jurisdiction to the court first seised. However, in my view, it is not for the Court to incorporate such a rule into the scheme of the regulation by judicial decision. [37] The introduction of such a rule, which would certainly be desirable if the solution I am suggesting were adopted, would in fact fall exclusively to the EU legislature. Consequently, as the law stands at present, only the mechanism for virtually automatic recognition provided for in Article 25(1) of the regulation would enable the risk of irreconcilable judgments to be avoided in cases of concurrent jurisdiction.

e) Conclusions on the first part of the question referred for a preliminary ruling

61. On the basis of all the above considerations, I consider that the answer which should be given to the tribunal de commerce de Versailles is that the court having jurisdiction under Article 3(2) of the regulation to open secondary proceedings also has jurisdiction to determine which of the debtor's assets fall within the scope of the effects of those proceedings. An action designed to determine whether one or more elements of the debtor's estate fall within the scope of the main proceedings or the secondary proceedings may be brought either before the court of the Member State where the main proceedings have been opened or before that of the Member State where the secondary proceedings have been opened.

B – *The second part of the question referred for a preliminary ruling: the applicable law*

62. By the second part of the question referred for a preliminary ruling, the tribunal de commerce de Versailles asks the Court, should it be concluded that the courts of the Member State where the secondary proceedings have been opened have jurisdiction to determine the scope of the effects of those proceedings, which is the law applicable to that determination.

63. In accordance with Article 4(1) of the regulation, the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened and, consequently, depends on which court is determined to have international jurisdiction to open such proceedings under Article 3 of the regulation. [38] That solution is expressly confirmed by Article 28 of the regulation, which provides that 'save as otherwise provided in [the regulation], the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened'.

64. That said, the regulation laid down a certain number of uniform substantive rules intended to apply by way of derogation from the national law designated as applicable.

37 — Although it is true that, in the judgment in *Staubitz-Schreiber* (C-1/04, EU:C:2006:39), the Court held, as the regulation is silent in that respect, that, where the centre of the debtor's main interests is transferred to another Member State after the request to open insolvency proceedings has been lodged, *the first court seised* retains jurisdiction to open insolvency proceedings, the circumstances of the case were very different, as the Court had been asked to give a ruling on the legitimacy of a potential transfer of jurisdiction and not to resolve an existing conflict of jurisdiction.

38 — See, to that effect, judgments in *Eurofood IFSC* (C-341/04, EU:C:2006:281, paragraph 33); *MG Probud Gdynia* (C-444/07, EU:C:2010:24, paragraph 25); and *Rastelli Davide e C.* (EU:C:2011:838, paragraph 16).

65. Thus, so far as is of interest in this case, it should be remembered first of all that Articles 3(2) and 27 of the regulation establish a specific criterion for the division of the debtor's assets between the main and secondary proceedings based on where those assets are situated, which may not be derogated from either by provisions of national law or by agreement between the persons responsible for those two sets of proceedings. In accordance with that criterion, those of the debtor's assets that are situated within the territory of the Member State in which the secondary proceedings have been opened fall within the scope of those proceedings and, consequently, *the proceeds from the sale of those assets must also fall to those proceedings*. On the other hand, still applying that criterion, those of the debtor's assets that are situated in a third State *cannot in any event fall within the scope of secondary proceedings*, for the simple reason that they are not situated within the territory of the Member State in which such proceedings have been opened. Such assets therefore necessarily fall to the main proceedings, which have universal scope. As I have already stated in point 37 above, any interpretation based on national law which extends the effects of secondary proceedings to assets of a debtor which are situated in a third State would not be compatible with the regulation.

66. Next, it is possible to infer from the provisions of the regulation a rule, on which all the interested parties who have submitted observations in the present proceedings agree, to the effect that the date to which reference must be had in order to assess whether or not assets are situated within the territory of the Member State in which the secondary proceedings have been opened is that on which the judgment opening those proceedings becomes effective. Such a conclusion follows in particular from reading Article 2(f) of the regulation [39] in conjunction with Article 18(2). [40] Thus, any removal of a debtor's assets outside the territory of the Member State of opening of secondary proceedings after that date, including where that removal involves not the assets themselves but the proceeds from their liquidation, and including where it has been authorised by the court hearing those proceedings under a coordination agreement with the main proceedings, cannot have the effect of excluding those assets or the proceeds from their sale from the scope of the secondary proceedings. [41]

67. Lastly, as I have already mentioned in point 53 above, the regulation contains certain substantive provisions intended to provide guidance to the courts having jurisdiction when applying the criterion for dividing a debtor's assets between the main proceedings and the secondary proceedings. Article 2(g) of the regulation defines what is meant for the purposes of the regulation by 'the Member State in which assets are situated', and does so for three different categories of assets: tangible property; property and rights ownership of or entitlement to which must be entered in a public register; and claims. Although it may be insufficient to cover every type of asset, especially in view of the complexity of some estates, [42] that provision nevertheless demonstrates the intention of the Community legislature to make the determination of the location of a debtor's assets subject to uniform rules. That choice and the incomplete nature of the list provided by Article 2(g) no doubt demand a major effort of interpretation on the part of national courts, which have the task of identifying a rule applicable to each specific case on the basis of that provision.

68. Having regard to the above considerations, in the present case it is for the tribunal de commerce de Versailles to determine the location, *as at the date of opening of the secondary proceedings* and *on the basis of the criteria established in Article 2(g) of the regulation*, of all of NNSA's tangible and intangible assets which have been sold, including its equitable or beneficial ownership of the Nortel

39 — Article 2(f) of the regulation provides that, for the purposes of the regulation, 'the time of opening of proceedings' is to mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.

40 — According to Article 18(2) of the regulation, '[t]he liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that movable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings'.

41 — I would point out that, according to the proposal for amending the regulation, the liquidator in the proceedings should be prohibited from re-locating any assets situated in a Member State in which the debtor has an establishment even before secondary proceedings are opened, in order to ensure effective protection of local interests (see paragraph 12 of that proposal inserting recital 19b into the regulation).

42 — The proposal for amending the regulation inserts in Article 2(g) (which becomes Article 2(f)) additional rules on the location of assets, relating to registered shares in companies, to financial instruments title to which is evidenced by entries in a register, and to cash held in a bank account (see paragraph 21 of the proposal).

group's intellectual property under the MRDA and also the exclusive and perpetual free licences which it held under that agreement.[43] In that regard, it is my view that it is first of all for the referring court to establish whether, having regard to that agreement, those rights may be split and regarded as separate assets.

69. Next, it is for that court to establish whether, under Canadian law, to which the MRDA is subject, NNSA's right to payment of the 'R&D allocation' must be classified as a 'right in rem', as the works council of NNSA argues, or as a 'claim' arising from its contribution to the Nortel group's research and development activities. In the latter case, the criterion concerning the centre of the third-party debtor's main interests laid down in the third indent of Article 2(g) of the regulation could be applicable. In that regard, I note, as an aside, that the fact that *the share of the proceeds* falling to NNSA following the sale of the latter's assets could in fact be classified as a claim on the proceeds against the escrow account — and as such situated outside the territory of the European Union — is not relevant if it is to be concluded that the assets in question were situated within French territory on the date on which the judgment opening the secondary proceedings became effective. As I have already observed in point 66 above, the way in which assets have been sold cannot have the effect of assigning those assets to the main proceedings when they were initially assigned to the secondary proceedings and vice-versa.

70. If, as I believe, the right of beneficial ownership arising from the system set up by the MRDA cannot be reduced to a simple claim, it is necessary to ascertain whether it may fall within one of the two categories provided for in the first and second indents of Article 2(g) of the regulation. In that regard, I am not convinced by the joint administrators' argument to the effect that that right is covered by the second indent since it relates to intellectual property rights which are entered in a register. Neither beneficial ownership giving rise under the MRDA to the R&D allocation nor, moreover, the right to exploit the Nortel group's intellectual and industrial property that derives from the exclusive licences granted by NNL under that agreement can be classified as 'rights … entitlement to which must be entered in a public register' within the meaning of the second indent of Article 2(g) of the regulation. The mere fact that those rights are 'linked' to industrial or intellectual property rights which themselves have been registered (by NNL and outside the territory of the European Union) does not alter that conclusion. Nor, in my view, can it be argued, as the works council of NNSA seems to suggest, that the rights in question come under the first indent of Article 2(g) of the regulation in that they have been 'materialised' in the form of licences, as the latter cannot be considered to be tangible assets.

71. It is therefore necessary to derive from Article 2(g) of the regulation a rule that takes account of the specific nature of the assets in question. I consider that it is possible to derive general guidance from the first two indents of that provision, namely that the various components of a debtor's estate must, in principle, be assigned to the insolvency proceedings to which they are naturally closest. This is so in the case of tangible assets, which are assigned to the proceedings opened within the territory of the Member State in which they are situated and in the case of property and rights which must be registered, which fall within the scope of the insolvency proceedings opened in the Member State under whose authority the register is kept. The same rule is applied *a contrario* in Article 12 of the regulation, according to which 'a Community patent, a Community trade mark or any other similar right … may be included only in the proceedings referred to in Article 3(1)', because they cannot be attached to the territory of a single Member State as their effects apply to the entire territory of the

43 — According to the version of the MRDA submitted by the joint administrators, each company in the Nortel group which was a party to that agreement undertook to pursue its research and development activities as in the past and to make the results available to the other parties to the agreement. As consideration, it would receive a sum proportional to its contribution to the group's research and development activities, known as the 'R&D allocation', in accordance with a table annexed to the agreement. That allocation was considered to be the 'measure of the benefit' to which each party was entitled. The agreement also provided that, unless otherwise expressly provided (for example, in respect of trade mark rights), NNL was the legal holder of all the group's current and future intellectual property rights, in consideration for which NNL undertook to grant a free exclusive licence to exploit the entire body of the group's intellectual property to each company that was a party to the agreement.

European Union. The proposed amendment to Article 2(g) of the regulation submitted by the Commission is based on the same logic, since the new indents (relating to registered shares in companies, financial instruments title to which is evidenced by entries in a register, and cash held in a bank account) likewise embody criteria which give preference to assigning assets to the territory of the Member State with which they have the closest links.

72. To return to the case before the referring court, it is my view that, in accordance with the rule referred to above, in so far as rights which derive from the debtor's participation in the research and development activities of a group of companies and/or which are concerned with exploitation of the results of those activities on the basis of a system of free and exclusive licences do not fall within the scope of the second and third indents of Article 2(g) of the regulation, they should be determined to be situated within the territory of the Member State where the debtor who has contributed to those research and development activities and who has exploited the results thereof to develop its business has its centre of activities.

73. On the basis of the above considerations, I consider that the answer to the second part of the question submitted for a preliminary ruling by the referring court should be that, in order to determine whether assets of a debtor fall within the scope of the effects of the secondary proceedings, the court seised must establish whether those assets were situated within the territory of the Member State in which those proceedings have been opened on the date on which the judgment opening them became effective and that the location of those assets must be determined on the basis of the criteria laid down in Article 2(g) of the regulation.

IV – **Conclusion**

74. In the light of all the above considerations, I propose that the Court should reply as follows to the tribunal de commerce de Versailles:

The court having jurisdiction under Article 3(2) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings to open secondary proceedings also has jurisdiction to determine which of the debtor's assets fall within the scope of the effects of those proceedings.

An action designed to determine whether one or more elements of the debtor's estate fall within the scope of the main proceedings or the secondary proceedings may be brought either before the court of the Member State where the main proceedings have been opened or before that of the Member State where the secondary proceedings have been opened.

In order to determine whether assets of a debtor fall within the scope of the effects of the secondary proceedings, the court seised must establish whether those assets were situated within the territory of the Member State in which those proceedings have been opened on the date on which the judgment opening them became effective. The location of those assets must be determined on the basis of the criteria laid down in Article 2(g) of Regulation No 1346/2000.