OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 10 March 2011 [1]

I — Introduction

1. Article 3 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2] ('the Insolvency Regulation') determines the Member States whose courts have jurisdiction to open insolvency proceedings in internal market cases of a cross-border nature. [3] The courts of the Member State within the territory of which the centre of a debtor's main interests is situated have jurisdiction to open insolvency proceedings. The present case gives the Court of Justice the opportunity to further define the concept of 'the centre of main interests'.

2. The distinctive feature of the present case is that an Italian company transferred its registered office from Italy to the United Kingdom. Over a year after the company was wound up and removed from the British register of companies, a creditor applied for insolvency proceedings to be opened in Italy. The referring court entertains doubt as to whether it may consider itself to have international jurisdiction in the case which has been submitted to it.

II — Legislative framework

A — *European Union law*

3. In Article 2 of the Insolvency Regulation the concept of 'establishment' is defined as follows:

'For the purposes of this Regulation:

...

(h) "establishment" shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.'

1 — Original language: German.

2 — OJ 2000 L 160, p. 1. The regulation currently applies as amended by the Implementing Regulation of the Council (EU) No 210/2010 of 25 February 2010.

3 — According to recital 33, the Insolvency Regulation does not apply to Denmark and applies in other respects subject to the restrictions of its Article 44 which regulates its relationship to other Conventions concluded by the Member States.

4. Article 3 of the Insolvency Regulation concerns international jurisdiction and provides:

'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. Recital 13 of the Insolvency Regulation states:

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

B — *National law*

6. The Tribunale di Bari (Italy) draws attention to the fact that under Article 382 of the Italian Codice di procedura civile (Code of Civil Procedure) and according to settled domestic case-law in relation to that provision, a preliminary ruling on the question of jurisdiction from the Corte di Cassazione is final and binding on the lower instance court before which the case is pending.

III — Main proceedings and questions referred for a preliminary ruling

7. According to the order for reference, the facts are as follows:

8. Interedil Srl was formed in Italy with its registered office in Monopoli. On 18 July 2001, it transferred its registered office to London. It was entered in the United Kingdom companies register [4] as an 'FC' (Foreign Company). Also on 18 July 2001, Interedil Srl was removed from the Italian companies register. [5] [6]

9. According to the order for reference, Interedil had pointed out that on the same

4 — Companies House.

5 — Registro delle imprese.

6 — The Tribunale di Bari appears to consider this removal to have been unlawful, though the precise reasons for this are not given.

date – 18 July 2001 – on which it transferred its registered office, it engaged in corporate transactions in London as a result of which the British Canopus Group acquired Interedil Srl and contracts were negotiated and entered into for the transfer of a business concern. In addition, the properties situated in Taranto (Italy) were transferred, a few months later, to Windowmist Limited, as assets of the business that had been transferred.

10. According to the order for reference, on 22 July 2002 Interedil Srl was 'closed down' [7] and struck off the register of companies in the United Kingdom.

11. In October 2003, Intesa Gestione Crediti SpA filed a petition before the Tribunale di Bari for the opening of insolvency proceedings in respect of the assets of Interedil.

12. Interedil Srl, in liquidation ('Interedil') contested the jurisdiction of that Italian court and in December 2003 issued an application for a preliminary ruling on the question of jurisdiction from the Italian Corte di Cassazione, arguing that since the company's registered office had been transferred from Italy to the United Kingdom, the Italian courts no longer had jurisdiction over the opening of insolvency proceedings.

13. The Tribunale di Bari rejected the plea alleging that the Italian courts lacked jurisdiction as manifestly unfounded and established that the company was insolvent and it accordingly made an order in May 2004 for the winding-up of '*Interedil Srl, in liquidation, whose registered office [was formerly] 262 Chelsea Chambers, Fulham Road, London*' without waiting for the result of the proceedings before the Corte di Cassazione on the question of jurisdiction.

14. By action brought on 18 June 2004, Interedil challenged the winding-up order.

15. By its Order No 10606/2005 of 20 May 2005, the Corte di Cassazione declared that jurisdiction lay with the Italian courts. It held that the following factors were sufficient to regard the presumption in the second sentence of Article 3(1) of Council Regulation No 1346/2000, pursuant to which the centre of a debtor's main interests corresponds to the registered office of the company, as rebutted: the existence in Italy of immovable property owned by Interedil, a lease agreement in respect of two hotel complexes, a contract with a banking institution, and failure to notify the Bari register of companies of the transfer of the company's registered office to London.

7 — 'Chiusa e dunque cancellata dal Registro delle Imprese'.

16. In view of the judgment of the Court of Justice in *Eurofood IFSC*,[8] the Tribunale di Bari has doubts about that assessment by the Corte di Cassazione. Accordingly, it decided to stay the main proceedings and referred to the Court of Justice the following questions for a preliminary ruling:

'(1) Is the term "the centre of a debtor's main interests" in Article 3(1) of Regulation No 1346/2000 to be interpreted in accordance with Community law or national law, and, if the former, how is that concept to be defined and what are the decisive factors or considerations for the purpose of identifying the "centre of main interests"?

(2) Can the presumption laid down in Article 3(1) of Regulation No 1346/2000, according to which "[i]n the case of a company... 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", be rebutted if it is established that the company carries on genuine business activity in a State other than that in which it has its registered office, or is it necessary, in order for the presumption to be deemed rebutted, to establish that the company has not carried on any business activity in the State in which it has its registered office?

(3) If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, are these sufficient factors or considerations to rebut the presumption laid down in Article 3(1) of Regulation No 1346/2000 that the place of the company's "registered office" is the centre of its main interests and are such circumstances sufficient for the company to be regarded as having an "establishment" within the meaning of Article 3(2) of Regulation No 1346/2000?

(4) If the ruling on jurisdiction by the Corte di Cassazione in the aforementioned Order No 10606/2005 is based on an interpretation of Article 3 of Regulation No 1346/2000 which is at variance with that of the Court of Justice of the European Communities, is the application of that provision of Community law, as interpreted by the Court of Justice, precluded by Article 382 of the Code of Civil Procedure, according to which rulings on jurisdiction by the Corte di Cassazione are final and binding?'

8 — Case C-341/04 [2006] ECR I-3813.

IV — Legal assessment

A — *Admissibility of the reference for a preliminary ruling*

17. Before considering the questions referred for a preliminary ruling, it is necessary, as a first step, to clarify whether the reference for a preliminary ruling made by the Tribunale di Bari is admissible.

1. Courts' restricted right to refer questions for preliminary rulings pursuant to Article 68 EC

18. The Tribunale di Bari referred its questions to the Court of Justice by its order of 6 July 2009, lodged at the Court of Justice on 13 October 2009. At that time the Lisbon Treaty had not yet entered into force.

19. The Insolvency Regulation was adopted on the basis of Article 61(c) and 67(1) EC. It is consequently an act in relation to which lower instance courts did not have a right to refer questions for preliminary rulings pursuant to Article 68 EC. As the Commission stated, there are essentially judicial remedies against the decisions of the referring court available under national law. [9] Accordingly, pursuant to Article 68 EC, the referring court did not have the right to refer questions for preliminary rulings.

20. However, when the Lisbon Treaty came into force on 1 December 2009, Article 68 EC was repealed, with the effect that the restriction of the right to refer questions for preliminary rulings no longer exists at the current time. [10] As the Court of Justice decided in its judgment in *Weryński*, in such a case the right to refer questions for preliminary rulings must be assessed according to the legal position at the time of the decision of the Court of Justice on the reference for a preliminary ruling and not according to that at the time the reference was lodged. [11] Consequently, the Court of Justice has, since 1 December 2009, had jurisdiction to hear requests for preliminary rulings from courts whose decisions are appealable under national law, even if the request was lodged before that date. [12] Accordingly, the reference for a preliminary ruling is not inadmissible as a result of the

9 — According to Article 18 of the Italian Law on insolvency (Legge Fallimentare) in the version of the Decreto Legislativo No 169 of 12 September 2007 the decision of the Tribunale di Bari may be appealed.

10 — In relation to the transitional regime see footnote 4 to my Opinion in Case C-283/09 *Weryński* [2010] ECR I-601.

11 — *Weryński*, paragraph 30; see also in relation to this points 23 to 25 of my Opinion in *Weryński* (cited in footnote 10,).

12 — *Weryński*, paragraph 31.

lack of a right to refer questions for preliminary rulings.

2. Inadmissibility due to non-existence of the company

21. In the oral procedure before the Court of Justice, Interedil (in liquidation) emphasised that the questions referred for a preliminary ruling were hypothetical and therefore inadmissible, since Interedil had no longer existed since its removal from the United Kingdom companies register and therefore the questions referred to the Court of Justice were of a hypothetical nature. The Commission also identified this problem in its pleading.

22. In this respect, it must be recalled that the Court may only decline to give a ruling on a question referred to it by a national court if it is obvious that the interpretation of Union law sought by that court bears no relation to the true nature of the main action or its purpose, or where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [13]

13 — This is settled case-law, see only Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I- 13533, paragraph 25.

23. It is not apparent in any obvious way from the statements made in the reference for a preliminary ruling that the questions referred bear no relation to the purpose of the main action. Even if Interedil no longer exists in law, that does not preclude Italian law from providing in such circumstances for possibilities for satisfying creditors' claims by means of a supplementary liquidation and the referring court wanting to open insolvency proceedings for that reason.

3. The objections of inadmissibility raised by the defendants in the main proceedings concerning the reference for a preliminary ruling and the answer to the fourth question referred

24. The defendants in the main proceedings are of the opinion that the reference for a preliminary ruling is inadmissible for three further reasons. They refer to the binding decision of the Italian Corte di Cassazione, which had already held in interim proceedings that the Italian courts had jurisdiction in respect of the insolvency proceedings. That decision had become final. Consequently, they assert that it is no longer a pending case within the meaning of Article 267 TFEU.

25. The defendants in the main proceedings also criticise the formulation of the questions referred: the first and the fourth question do not reveal any contradiction between the EU law provisions and their application by the

national courts. They submit that the second and third questions request the Court of Justice to apply the EU law provisions to the specific case.

26. By its first three questions, in essence the referring court would like to know how the concept of the centre of main interests in Article 3 of the Insolvency Regulation should be interpreted. This is an admissible subject-matter for a reference for a preliminary ruling.

27. Therefore, it is only necessary to consider below the first two objections of the defendants in the main proceedings in relation to admissibility, which are based on the final and binding decision of the Corte di Cassazione.

28. In this context it is also appropriate to consider the fourth question referred by the referring court. By that question, the referring court would in essence like to know whether it is bound by the decision of the Corte di Cassazione confirming the international jurisdiction of the Italian courts, which is binding under national law, even if that decision should prove to be incompatible with the case-law of the Court of Justice. If that were the case, then the remaining questions would not have any significance for the dispute in the main proceedings and would therefore be inadmissible.

29. Pursuant to Article 382 of the Italian Code of Civil Procedure, a lower instance court is bound by a decision made by the Corte di Cassazione in the context of interim proceedings on jurisdiction.

30. The Court of Justice has already established that a rule of national procedure, pursuant to which a court, which is called upon to decide a case referred back to it by a higher court hearing an appeal, is bound by legal rulings of the higher court, cannot call into question the discretion of lower instance courts to make a reference to the Court for a preliminary ruling where they have doubts as to the interpretation of EU law. [14]

31. Nothing else can apply in the present case which concerns a rule of national procedure which relates to the binding effect of decisions of a higher court in the context of interim proceedings on international jurisdiction.

32. Finally, according to settled case-law, a national court which is called upon, within the limits of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing to apply any conflicting provision of national legislation without it being necessary for the court to request or await the prior setting aside of such provision by legislative or

14 — Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraph 25.

other constitutional means. [15] This might also include a rule of national procedure, such as that applicable in the present case, which results in the binding effect of the decision of the higher court. [16]

33. Accordingly, the decision of the Court of Justice continues to be solely decisive in relation to the interpretation of EU law and it is of no consequence that a national higher court has already considered the interpretation of EU law in the context of interim proceedings.

4. Interim conclusion

34. As an interim conclusion, it must therefore be maintained that the reference for a preliminary ruling is admissible.

35. The fourth question referred must be answered as follows: it is not compatible with EU law for a national court which is called upon to decide a case after a binding interim decision on jurisdiction by a higher court to be bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with EU law.

B — *Questions referred for a preliminary ruling*

36. The first, second and third questions referred relate to the interpretation of the concept of the centre of a debtor's main interests in Article 3(1) of the Insolvency Regulation; they can therefore be examined together (under 1 below). The third question referred is aimed at additionally defining more precisely the concept of establishment under Article 3(2) of the Insolvency Regulation (under 2 below).

1. Concept of centre of main interests in Article 3(1) of the Insolvency Regulation

37. Article 3(1) determines international jurisdiction for opening insolvency proceedings. That provision provides that the courts

15 — *Elchinov* (cited in footnote 13, paragraph 31, with reference to Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24, and Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81).

16 — To this effect, see *Elchinov* (cited in footnote 14, paragraph 31).

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.

(a) Autonomous definition

38. By its first question referred, to begin with the referring court would like to know whether the concept of the centre of main interests should be defined autonomously for the purposes of the regulation or by reference to national law.

39. According to settled case-law, it follows from the requirements for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question. [17]

40. Accordingly, the Court of Justice has also established already in *Eurofood IFSC* on Article 3(1) of the Insolvency Regulation that 'the concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.' [18]

(b) Determining the centre of main interests

41. 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.

42. The referring court asks about the interpretation of the concept of the centre of main interests and about the criteria with which the presumption laid down in the second sentence of Article 3(1) can be rebutted.

17 — Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 24 with further references.

18 — Cited above in footnote 8, paragraph 31.

(i) The decisive time

43. The facts of the present case are distinguished by two special features. Firstly, according to the statements made in the reference for a preliminary ruling, at the time the application for insolvency proceedings was filed the company concerned had already been closed down and struck off the register of companies in the United Kingdom for over a year. Secondly, prior to the winding-up phase, the company had transferred its registered office from Italy to the United Kingdom. Consequently, it is first of all necessary to consider what influence a transfer of the registered office has on determining jurisdiction. As a second step, it is then necessary to clarify what point in time should be taken for the purposes of determining the insolvency forum in which jurisdiction lies if the company has already been removed from the register of companies a considerable time prior to the application for insolvency proceedings being filed.

44. There is no express rule in Regulation No 1346/2000 which deals with the transfer of the registered office. Therefore in accordance with the general rule in Article 3 the last registered office should be taken as a basis unless the presumption in Article 3(1) is rebutted by proof that the centre of main interests did not in fact follow the change of registered office, but remained in the State of departure.

45. These consequences of a transfer of the registered office for determining which insolvency court has jurisdiction could certainly lead to disadvantages for creditors who had entered into their legal relationships with the debtor in the State of departure: at the time of entering into legal relationships with the debtor, the creditors would have assumed that any potential insolvency proceedings would be conducted in one place, which would no longer prove to be applicable after the transfer of the registered office. Therefore by taking into account a transfer of the registered office for the purposes of determining jurisdiction, the expectation of the creditors in the State of departure in this respect are not met.

46. The provisions of the Insolvency Regulation on international jurisdiction are in fact based on the very aim of making it possible for potential creditors to be able to clearly identify in advance the legal system which would resolve any insolvency affecting their interests. [19] International jurisdiction, which pursuant to Article 4(1) also entails the application of the substantive insolvency laws of a given State, is based on a place known to the debtor's potential creditors, thus enabling the

19 — See Opinion of Advocate General Jacobs *Eurofood IFSC*, cited above in footnote 8, point 118.

legal risks which would have to be assumed in the case of insolvency to be calculated. [20]

47. The fact that in the event of a change of registered office international jurisdiction for insolvency proceedings may however subsequently move is nevertheless consciously accepted by the regulation. Unlike the provisions in some national legal systems, or in the draft of an EC Insolvency Convention from 1980, [21] it does not contain any specific provision for the event of a transfer of the registered office, pursuant to which for a transitional period after the transfer of the registered office the courts of the State of departure also continue to have jurisdiction.

48. On the contrary, by basing itself solely on the centre of main interests and its effective transfer accordingly also resulting in a change in the international jurisdiction for insolvency proceedings, the Insolvency Regulation instead logically takes into account the basic freedom of establishment, which would be at least indirectly affected by a more restrictive provision. Essentially, for that reason it may also not be demanded that the new registered office must have existed for a certain period before an application for insolvency proceedings is filed. The question of whether in exceptional cases – direct correlation in terms of timing between the transfer of the registered office and the application for insolvency proceedings being filed – a different rule must apply does not need to be considered here, since there was over a year between the transfer of the registered office and the application for insolvency proceedings.

49. It remains to be considered below what point in time should be taken as a basis if at the time the insolvency application is filed the company has already been removed from the register of companies.

50. The Court of Justice has decided, in connection with a transfer of a registered office which took place *after* filing an application for insolvency proceedings but before the proceedings were opened, that the State of departure retains jurisdiction to open those proceedings. [22] Accordingly, in essence the time of filing the application for insolvency

20 — Opinion of Advocate General Jacobs in *Eurofood IFSC*, cited above in footnote 8, point 122.

21 — See Article 6f of the draft Convention on Insolvency Proceedings from 1980 (Übereinkommens über den Konkurs, Vergleich und ähnliche Verfahren von 1980, EG-Dok. III/D/72/80-DE, printed in: Gerhard Kegel (publisher) and Jürgen Thieme (editor), *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens*, Tübingen 1988).

22 — Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, paragraph 29.

proceedings is decisive for the purposes of assessing the centre of main interests.

51. However, in a case such as the present one, in which the company has already been wound up and removed from the register for some time at the time the application for insolvency proceedings is filed, on the face of it the problem arises when taking the time of filing the application for insolvency proceedings as a basis, that at the time the application is filed the company no longer has any interests within the meaning of Regulation No 1346/2000, because it no longer exists.

52. This problem could be solved by only taking the registered office as a basis in such a case and no longer permitting the presumption to be rebutted: a company still has a registered office after it has been wound up. Then for a company which has been wound up, without exception, the Member State of the registered office would have jurisdiction in respect of the insolvency proceedings.

53. However, the result of this ad hoc approach is unconvincing. It may be argued in its favour that, even in the case of a liquidation company, the registered office is also easily ascertainable and that basing jurisdiction on that registered office accordingly ensures legal certainty. It may be said against this approach, however, that its consequence would be that even in cases in which the company's centre of main interests prior to its removal from the register had never been located at the place of its registered office, the latter would nevertheless establish jurisdiction. However, this approach should be rejected, since by using the concept of the centre of main interests, the regulation aims to base jurisdiction on the place which is identifiable by its creditors as being the place with which the company objectively demonstrates the closest links. If the registered office of the active company constituted a mere letterbox and the centre of its main interests therefore lay in another place, it is not appropriate to nevertheless then base jurisdiction on the registered office after the removal of the company from the register.

54. Consequently, even in the case of a company which has been closed down, the presumption in Article 3(1) can still be rebutted if it is proven that prior to closing down, the company did not have the centre of its main interests in the State of the registered office. Then the place of the last centre of its main interests prior to closing down is decisive. The period which should be taken as a basis for these purposes must be ascertained by means of an evaluatory overall assessment from the creditors' perspective.

(ii) Interpretation of the concept of 'centre of main interests'

55. Next it is necessary to examine which criteria determine the centre of a debtor's main interests within the meaning of Article 3(1) of the Insolvency Regulation.

56. Regrettably, there is no definition of centre of main interests in Article 2 of the regulation, which defines the most important concepts in the regulation. The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs rightly criticised that during the legislative procedure. [23] Only recital 13 of the regulation states that the centre of main interests 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

57. With reference to recital 13, in *Eurofood IFSC* the Court of Justice took into consideration 'that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and forseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings'. [24] The Court of Justice emphasised the importance of legal certainty and forseeability specifically against the background that pursuant to Article 4(1) of the regulation, determining the Member State with jurisdiction also determines the applicable law.

58. Therefore the presumption laid down in Article 3 in favour of the registered office can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. [25] As a possible example of a rebuttal of the presumption, the Court of Justice cited the case of a letterbox company not carrying out any business in the territory of the Member State in which its registered office is situated. [26]

59. The Corte di Cassazione referred in its decision issued in relation to the interim proceedings to the fact that after the transfer of its registered office Interedil had not carried on any business activity in the United Kingdom, had not carried out any transactions there and had not even carried out

23 — Contained in the report on the proposal for a council regulation on insolvency proceedings of the Committee on Legal Affairs and the Internal Market (rapporteur Kurt Lechner), Document A5-0039/2000, where it was proposed that the following definition should be incorporated in Article 2 of the regulation: '"centre of main interests": the place where the debtor has his main commercial interests and carries on other economic activities and with which he therefore has very close contacts.'

24 — *Eurofood IFSC*, cited above in footnote 8, paragraph 33.

25 — *Eurofood IFSC*, cited above in footnote 8, paragraph 34).

26 — *Eurofood IFSC*, cited above in footnote 8, paragraph 34 and 35.

winding-up activities there: in fact, it said, the centre of the administration and organisation had not been transferred to London at all.

60. In relation to a company which does not carry on any business activity or any administrative activity at all in the State of the registered office, the presumption in Article 3 of the regulation could indeed be rebutted.

61. However, the second question referred implies that the referring court does not proceed on the basis that Interedil did not carry on any activity at all at its new registered office in London. Therefore, unlike in the case of a mere letterbox firm, which was cited as a possible example for the rebuttal of the presumption in the *Eurofood IFSC* case, the further question arises as to how the centre of main interests should be defined more precisely now.

62. A consideration of the legislative background to the regulation is not particularly helpful in this respect: such a consideration establishes that the specific terminology was even the subject of dispute during the legislative process. The starting point was an initiative of Germany and Finland, reproducing the EU Convention on insolvency proceedings which did not enter into force. [27] Recital 13 of that proposal still contained a more comprehensive definition of the concept of centre of main interests. There it was stated: 'the centre of main interests is taken as meaning a place with which a debtor regularly has very close contacts, in which his manifold commercial interests are concentrated and in which the bulk of his assets is for the most part situated. The creditor is also very familiar with that place'. The Luxembourg delegation criticised the fact that this made the assets the focal point, rather than, as it favoured, the debtor's activities or the administration of his assets. [28]

63. After an amended draft [29] by the General Secretariat of the Council was also critically received, [30] the legislature decided to adopt the first sentence of point 75 of the

27 — Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999 (OJ 1999 C 221, p. 8).

28 — Comments from the Luxembourg delegation, Council document No 10342/99 of 20 July 1999.

29 — See Council document No 9934/1/99 of 29 July 1999 and for a further reformulation, Council document No 9934/2/99 of 22 October 1999.

30 — Thus for example the British delegation criticised the fact that the definition was problematic since a debtor might carry on his interests from various places and the criteria for determining the 'main' interests were also unclear (see Council document No 10683/99 of 13 September 1999).

explanatory report on the Insolvency Convention [31] as recital 13 and accordingly took as a basis the place where the administration of interests is conducted.

64. With all this lack of conceptual clarity, the Court of Justice rightly based its judgment in *Eurofood IFSC* conclusively on the creditors' perspective. [32] In so doing, it took as a basis the wording of recital 13, which talks about the centre of main interests being ascertainable by third parties. It should be possible for potential creditors to know from the outset which Member State – according to the status quo – has jurisdiction in respect of insolvency proceedings and consequently at the same time which law would govern any such proceedings.

65. Accordingly, in order to establish the centre of commercial interests, a comprehensive overall assessment must be made from the creditors' perspective. As Advocate General Jacobs emphasised in his Opinion in *Eurofood IFSC*, for these purposes each case should be decided on its specific circumstances. [33]

66. Therefore a universally applicable isolated assessment of individual factors is ruled out from the outset. Neither the location of immovable property of the insolvency debtor, nor the location of rented property in relation to which it has concluded lease agreements with another company, nor the existence of a contract between the insolvent company and a banking institution situated in a certain Member State constitute in themselves factors which make it possible to conclusively determine the centre of main interests.

67. As the consideration of the legislative background has shown, the legislature also refrained from taking assets as a focal point for the purposes of defining the centre of main interests. Therefore merely taking as a basis the location of the substantial assets of the company is ruled out. This also appears convincing for the reason that it is often not straightforward for third parties to identify where most of a debtor's assets are located, particularly if they are distributed amongst several Member States.

68. Proceeding on the basis of the rebuttable presumption in Article 3(1) and the wording of recital 13, which is based on the administration of interests, the overall assessment which is necessary must instead always include which activities it is possible for third parties to objectively identify as being carried on by the company in the place of its registered office.

31 — M. Virgós and E. Schmit, Report of the Convention on Insolvency Procedures, Council of the European Union (Doc 6500/1/96 REV 1, paragraph 75).

32 — For these purposes, a broad understanding of the concept of creditor is assumed, which may also include the employee of an undertaking.

33 — Point 125 of the Opinion of Advocate General Jacobs in *Eurofood IFSC*, cited above in footnote 8.

69. According to the scheme of the regulation, if the central administration of a company is located at the place of its registered office, that means that its management is based there and the latter steers the affairs of the company from there and acts in a way which is identifiable to the outside world, where the substantial assets or places of business of the company are located being of no significance for the purpose of determining jurisdiction. The presumption in Article 3(1) and its reference to the registered office is based on the intention to determine the place of the central administration of the company, which is typically situated there, as being a connecting factor which is also identifiable for third parties. The explanatory report on the Convention, from which the formulation of recital 13 originates, proceeds on the basis that the registered office usually coincides with the debtor's principal place of business.[34] Therefore if the central administration is in fact located at the registered office, a different location of the main interests is ruled out from the outset.

70. A rebuttal of the presumption in Article 3(1) by also taking into account the location of the company's assets, its places of business or even its commercial activities therefore only comes into consideration if from the creditors' perspective the place of the central administration is not at the registered office. In those circumstances, if necessary further objective factors are required, also from the creditors' viewpoint, in order to clarify jurisdiction for the insolvency proceedings. In this respect an evaluatory overall assessment of the individual case must be carried out.

71. In the case in the main proceedings, after the transfer of its registered office the debtor appears to have carried out only winding-up activities. The legal transactions and acts carried out for the purposes of winding up a company are also in essence of relevance for the purposes of determining a company's centre of main interests. Ultimately, even a company's move to another Member State in order to wind itself up there is also covered by the basic freedoms in EU law. Hence in so far as the administration of these winding-up activities has been carried out from the new registered office, in a manner identifiable by third parties, then in the relevant period prior to the removal of the company from the register of companies, the administration of its main interests would have occurred at its registered office: consequently a rebuttal of the presumption in Article 3(1) would be ruled out.

34 — Explanatory report (cited in footnote 31, paragraph 75).

72. For the purposes of the present case it is not necessary to consider the problem of a transfer of the centre of main interests in order to escape the provisions on insolvency or liability in the State of origin or in order to put available assets beyond the reach of the creditors. The issue of a potential misuse of rights in respect of a transfer gives rise to interesting questions in relation to the conflicting priorities between the basic freedoms of the debtor on the one hand and creditor protection and the avoidance of 'forum shopping' which is addressed in recital 4 of Regulation No 1346/2000 on the other hand. [35] However, since the referring court did not formulate a question on this topic and it is not possible to infer sufficient grounds to suggest misuse of rights from the facts of the case which have been outlined, the present case does not permit these questions to be determined conclusively.

73. Nor is it necessary – the referring court not having requested it – to examine a further aspect arising from the decision of the Corte di Cassazione in the main proceedings. In that judgment, reference is made to the fact that the transfer of the registered office was not communicated to the Italian register of companies. However, the reference for a preliminary ruling states that on 18 July 2001 Interedil Srl was removed from the Italian companies register. If a company is entered in the registers of two Member States at the time of filing the application for insolvency proceedings, questions could arise as to the appearance of legality when considering the situation from the creditors' perspective. However, since the referring court proceeds on the basis that the company was removed from the Italian register, there are no grounds for considering this further here.

(c) Interim conclusion

74. The answer to the first and the second questions referred and to the first part of the third question referred must therefore be as follows: The concept of 'the centre of a debtor's main interests' in Article 3(1) of Regulation No 1346/2000 has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

75. If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, these are not as such sufficient factors to rebut the presumption laid down in Article 3(1) of Regulation No 1346/2000 that the place of the company's 'registered office' is the

35 — See also, on this point, Case C-212/97 *Centros* [1999] ECR I-1459; Case C-208/00 *Überseering* [2002] ECR I-9919; and Case C-167/01 *Inspire Art* [2003] ECR I-10155.

centre of its main interests. An overall assessment is necessary, which evaluates the place at which the company administers its interests according to objective criteria which are at the same time ascertainable by third parties. If the central administration is in fact located at the registered office, then another location for the main interests is ruled out.

2. Concept of establishment in Article 3(2) of the Insolvency Regulation

76. By the second part of its third question, the referring court alludes to the circumstances which must exist in order to be able to speak of an establishment within the meaning of Article 3(2) of the Insolvency Regulation. If it should in fact prove to be the case that Interedil did not have the centre of its interests in Italy and accordingly that the Italian courts did not have jurisdiction to open main insolvency proceedings, then there would at most be the possibility of conducting secondary insolvency proceedings in Italy. Pursuant to Article 3(2), a precondition to such proceedings is that Interedil possesses an establishment in Italy. Are the location of immovable property, a lease agreement in respect of two hotel complexes, and a contract with a banking institution sufficient for the existence of an establishment?

77. According to Article 2(h) of the Insolvency Regulation, establishment shall be taken to mean any *place of operations* where the debtor carries out a non-transitory economic activity with human means and goods.

78. With this wording, the Insolvency Regulation adopted that of the Convention on insolvency proceedings of the Member States of the European Union of 23 November 1995. In the explanatory report it was stated in relation to this that: '"place of operations" describes a place at which economic activities, whether commercial or industrial or of a professional nature are carried on in the market (that is outwardly). The statement that the economic activity requires human means implies that a minimum level of organisation must exist. A place of operations at which an activity is only occasionally carried on may not be described as an establishment. A certain amount of permanence is required.... How the activity appears to the outside world is decisive, not the purposes which the debtor pursues with this activity'.[36]

79. As with the rebuttal of the presumption pursuant to the second sentence of Article 3(1) of the regulation, the existence of

36 — Explanatory report (cited in footnote 31, paragraph 71).

assets alone is not in itself sufficient for Article 3(2). The referring court must instead examine whether human means and a minimum level of organisation existed there.

80. The answer to the second part of the third question referred must therefore be: If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, this can only be sufficient for the company to be regarded as having an 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000, if these factors individually or as a whole, on the basis of a permanently established organisational structure, are embedded in a place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

V — Conclusion

81. In the light of the foregoing considerations, I suggest that the Court should answer the request for a preliminary ruling as follows:

(1) The concept of 'centre of a debtor's main interests' in Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

(2) If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, these are not as such sufficient factors or considerations to rebut the presumption laid down in Article 3(1) of Regulation No 1346/2000 that the place of the company's 'registered office' is the centre of its main interests. What is necessary is an overall assessment which evaluates the place at which the company administers its interests according to objective criteria which are at the same time ascertainable by third parties. If the central administration is in fact located at the registered office, then another location for the main interests is ruled out.

(3) If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, these factors can only be sufficient for the company to be regarded as having an 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000, if these factors, individually or as a whole, on the basis of a permanently established organisational structure, are embedded in a place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

(4) It is not compatible with European Union law for a national court which is called upon to decide a case after a binding interim decision on jurisdiction by a higher court to be bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law.