

Request for a preliminary ruling — Case C-25/20**Reference for a preliminary ruling****Date lodged:**

20 January 2020

Referring court:

Višje sodišče v Ljubljani (Slovenia)

Date of the decision to refer:

18 December 2019

Insolvent debtor:

ALPINE Bau GmbH, Salzburg, Celje Branch, in insolvency

NK, liquidator in the main insolvency proceedings against ALPINE Bau GmbH

[omissis]

REQUEST FOR A PRELIMINARY RULING

The Višje sodišče v Ljubljani (Court of Appeal, Ljubljana), in the secondary insolvency proceedings against the debtor ALPINE BAU GmbH, Salzburg — Celje Branch [omissis], was seised of an appeal which the liquidator in the main insolvency proceedings pending against ALPINE Bau GmbH, [omissis] Wals in Salzburg, Austria [omissis], brought against the order of the Okrožno sodišče v Celju (Regional Court, Celje) [omissis] of 5 July 2019, which had dismissed the application for the lodgement of creditors' claims submitted by that liquidator in the main insolvency proceedings [omissis] on 30 January 2018.

STAY OF THE PROCEEDINGS BEFORE THE NATIONAL COURT

By order [omissis] of 18 December 2019, the Višje sodišče v Ljubljani [omissis] stayed the proceedings and decided to submit a request for a preliminary ruling to the Court of Justice of the European Union. **[Or. 1]**

SUMMARY OF THE SUBJECT MATTER OF THE DISPUTE AND THE RELEVANT FACTS

1. By order of 19 June 2013, the Handelsgericht Wien (Commercial Court, Vienna, Austria) opened insolvency proceedings against the company ALPINE Bau GmbH [omissis], which were initiated as restructuring proceedings but reclassified as insolvency proceedings on 4 July 2013. NK was appointed liquidator. As is clear from the order of the Handelsgericht Wien of 5 July 2013, the insolvency proceedings opened against ALPINE Bau GmbH constitute the main insolvency proceedings for the purposes of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ('the regulation').
2. On 6 August 2013, the liquidator in the main insolvency proceedings [omissis] submitted to the Okrožno sodišče v Celju an application for the opening of secondary insolvency proceedings against ALPINE BAU GMBH, Salzburg — Celje Branch.
3. By decision of 9 August 2013, the Okrožno sodišče v Celju opened the secondary insolvency proceedings against that branch and, by a notice published on the website of the AJPES (Agency of the Republic of Slovenia for statutory public registers and related services) on 9 August 2013, informed the creditors and the liquidators that, pursuant to Article 32 of the regulation, they had the right to lodge their claims in the main proceedings and in any secondary proceedings. That court invited creditors to lodge in those secondary proceeding, within three months of publication of the abovementioned notice, their claims and other rights, whether or not they enjoyed pre-emption, stated that the final date for lodgement was 11 November 2013, and reminded them that, if by the expiry of that period they had not lodged their claims and preferential rights, the latter would be extinguished vis-à-vis the insolvent debtor in those secondary insolvency proceedings and the court would dismiss any application for lodgement pursuant to Article 296(5) or Article 298(5) of the ZFPPIPP (Law on financial transactions, insolvency proceedings and compulsory liquidation).
4. On 30 January 2018, the liquidator in the main insolvency proceedings [omissis] submitted in those secondary proceedings an application for the lodgement of claims pursuant to Article 32(2) of the regulation and asked the insolvency court to grant that application and include it in any subsequent distribution of sums to the creditors in the secondary insolvency proceedings. **[Or. 2]**
5. By order of 5 July 2019, the Okrožno sodišče v Celju refused that application on the grounds that it was out of time, pursuant to Article 296(5) of the ZFPPIPP. It held that the time limit for lodging a claim laid down in Article 59(2) of the ZFPPIPP had expired on 11 November 2013.

RELEVANT PROVISIONS OF LAW

EU law

6. Under Article 32(1) of the regulation, any creditor may lodge his claim in the main proceedings and in any secondary proceedings. Article 32(2) of the regulation provides that the liquidators in the main and any secondary proceedings are to lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides. The liquidator in the main or secondary proceedings is to be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings (Article 32(3) of the regulation).
7. Under Article 28 of the regulation, save as otherwise provided therein, the law applicable to secondary proceedings is to be that of the Member State within the territory of which the secondary proceedings are opened.

Slovenian law

8. Article 59(2) of the Slovenian law governing insolvency proceedings (Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju¹ (Law on financial transactions, insolvency proceedings and compulsory liquidation)) provides that in insolvency proceedings a creditor must lodge his claims in respect of an insolvent debtor within three months of publication of the notice of the opening of such proceedings, save as otherwise provided for in paragraphs 3 and 4 thereof.² If the claim is guaranteed by a preferential right, the creditor is required also to lodge the preferential right in the insolvency proceedings, within the period laid down for lodging a claim, save as otherwise provided for in Article 281(1),³ or [Or. 3] Article 282(2),⁴ of the ZFPPIPP (Article 298(1) of the ZFPPIPP). Where a creditor allows the period for lodging the claim to lapse, his claim in respect of the insolvency debtor is to be extinguished and the courts are to refuse any claim lodged out-of-time (Article 296(5) of the ZFPPIPP). Where a creditor does not comply with the time limit for lodging a preferential right, that right is to be extinguished (Article 298(5) of the ZFPPIPP).

¹ Hereinafter: 'the ZFPPIPP' (Ur. List RS (Official Journal of the Republic of Slovenia) No 126/2007, as subsequently amended).

² These two paragraphs refer to claims arising on the basis of legal acts which are open to challenge or have been challenged.

³ In this paragraph the law deals with rights enjoying priority acquired in enforcement proceedings, on which the notice of the opening of insolvency proceedings has no effect.

⁴ Here the law governs preferential rights which may be relied on out of court.

9. There are no similar cases in the case-law of the Slovenian courts.

Austrian law

10. Paragraph 107(1) of the *Insolvenzordnung* (Law on insolvency) provides that, in respect of claims lodged after the expiry of the period for lodging claims and not dealt with at the general hearing to verify liabilities, a special hearing is to be ordered to verify that the debts exist. Paragraph 105(1) applies to such claims. Claims which are presented less than 14 days before the final hearing to examine liabilities will not be taken into consideration.

ARGUMENTS OF THE LIQUIDATORS

Arguments of the liquidator in the main insolvency proceedings

11. In his appeal, the liquidator in the main insolvency proceedings observes that the opening of secondary insolvency proceedings was requested with the aim of bringing assets located in Slovenia within the overall protection afforded by the rules on insolvency. The possibility of opening secondary insolvency proceedings is not intended to impose on the creditors in the main insolvency proceedings a new (additional) burden in relation to the lodgement of claims in those new secondary insolvency proceedings, and nor does it seek to ensure that, where claims are not lodged, the situation of those creditors is made worse in any way (for example, by establishing that they have a right to payment of their claims only within the limits of the assets remaining within the meaning of Article 35 of the regulation). Therefore, that is the interpretation to be given to Article 32(2) of the regulation, which provides for a special right for the liquidator — which the Slovenian legislation on insolvency does not recognise or, therefore, regulate. Under Article 32(2) of the regulation, the liquidator in the main proceedings himself may lodge [Or. 4] creditors' claims which have already been lodged in the main proceedings or in any secondary proceedings, bearing in mind there is no time limit on the lodgement of such claims. An interpretation which also bound the lodgement of claims by the liquidator in the main insolvency proceedings to the local Slovenian rules on the lodgement of claims which apply to a creditor would also conflict with the rules on the lodgement and verification of claims applicable in other Member States (for example, in this case, in Austria). In Austria different rules on the lodgement and verification of claims apply from those in force in Slovenia, which means that the implementation of Article 32(2) of the regulation would be impossible in practice if the application of that rule were bound by Article 59(2) of the ZFPPIPP. It is understandable that the liquidator in the main insolvency proceedings should wish to lodge only creditors' claims which have been duly lodged and verified in accordance with local rules. In that case, in view of the expiry of the short three-month period, it would be de facto impossible for the liquidator in the main proceedings to exercise the right under Article 32(2) of the regulation, since the claims of the creditors in the main proceedings in Austria had yet been duly lodged, examined or verified within that

period. The purpose of lodging claims by the liquidator pursuant to Article 32 of the regulation is to simplify the procedure and to ensure that, for example, all claims already lodged and verified in the main proceedings are transferred to the ancillary secondary proceedings in a single transaction. As regards the main proceedings [in this case], they are one of the main insolvency proceedings in Austria, in the course of which the creditors lodged their claims over a longer period of time, in accordance with Austrian law. Hearings to establish the claims were held on several occasions over a long period spanning several years, the final hearing being held on 2 October 2018. For the purposes of the effective application of Article 32(2) of the regulation, there is therefore an urgent need for the application of that provision not to be restricted by the time limit which applies to creditors under the provisions of national legislation (Article 59(2) of the ZFPPIPP). As a part of EU law having direct effect, the regulation prevails over the ZFPPIPP. Therefore, an interpretation that renders impossible the effective exercise of the rights of the liquidator in the main proceedings, which guarantees that rights are protected or ensures that creditors are treated equally, cannot be accepted. Otherwise, the creditors in the secondary proceedings would be in a better position than the creditors in the main proceedings. **[Or. 5]**

Arguments of the liquidator in the secondary insolvency proceedings

12. The liquidator in the secondary insolvency proceedings argues that the refusal of the application for the lodgement of claims submitted by the liquidator in the main proceedings is a consequence of the fact that it was submitted out of time for the purposes of Slovenian law. By that decision, the court applied national law, in accordance with Article 4(1) of the regulation, which provides that, save as otherwise provided therein, the law applicable is in any event to be that of the Member State in the territory of which such proceedings are opened. The regulation does not lay down a period within which liquidators may avail themselves of the possibility of lodging claims subsequently in other insolvency proceedings opened in respect of the same debtor. The argument that, in this regard, liquidators are not bound by any time limit is contradicted by the scope of national law outlined above, as identified by Article 4(1) of the regulation. Article 32(2) of the regulation does not create a special legal arrangement distinct from the lodgement of claims; that provision merely permits a liquidator to lodge the claims of creditors in his capacity as their representative, in their name and on their behalf, which, alongside general legal theory, also justifies the proviso, laid down in that article, that creditors have the right to oppose the lodgement of such claims or withdraw them. The procedural time limits, which must be applied to all persons in the same way or which cannot be differentiated on the basis of the creditor's representative, are set to ensure the proper conduct of the insolvency proceedings. The argument that liquidators in other insolvency proceedings opened against the same debtor are not bound by any time limit could lead to a standstill in the proceedings or limit the rights of creditors who have taken the steps required of them, as they were obliged to do, within the prescribed time limits. Moreover, an interpretation to the effect that only local creditors or

creditors in the secondary proceedings are bound by a limitation period and they alone must bear the consequences of acting out of time, whilst creditors in the main proceedings are free to lodge their claims in the secondary proceedings at any time, would result in unequal treatment of creditors. In the secondary proceedings at issue here there was nothing to prevent the creditors in the main proceedings submitting, within the prescribed time limit, an application to lodge a claim; since they failed to do so, an interpretation to the effect that they are required to bear the same consequences as those borne by national creditors where they lodge claims out of time conforms to general principles of law. The reference made by the liquidator in the main insolvency proceedings to the long time required to establish the claims in the main insolvency proceedings is irrelevant, since Article 32(2) of the regulation refers to the subsequent lodgement, in other proceedings, of claims lodged, not claims established. **[Or. 6]**

THE ESSENCE THE DISPUTE

13. The decisive question of substantive law is whether the lodgement in other proceedings, by the liquidators in the main proceedings and any other secondary proceedings, of claims which have already been lodged in proceedings for which those liquidators have been appointed, is subject to the time limits which apply to the lodgement of creditors' claims under the legislation of the Member State in which those proceedings are held, or whether the regulation lays down, in Article 32(2) thereof, a special right for a liquidator to lodge claims in other insolvency proceedings without being bound by any time limit.
14. If the rules on the lodgement of creditors' claims laid down in the law of the Member State in which the liquidators lodged the claims applied to the lodgement of claims under Article 32(2) of the regulation, it would be necessary in the present case, on the basis of Article 296(5) of the ZFPPIPP, read in conjunction with Article 59(2) thereof, to refuse the application for the lodgement of claims submitted by the liquidator in the main insolvency proceedings.
15. If the abovementioned time limits did not apply to the lodgement of claims under Article 32(2) of the regulation, as there is a special right for the liquidator who is not subject to the time limit applicable to the lodgement of creditors' claims, it would be necessary to take account of the lodgement and include the claims in the subsequent distribution of the insolvency estate in the secondary insolvency proceedings.

GROUND OF THE QUESTION REFERRED FOR A PRELIMINARY

16. The question raised has a significant effect on the conduct of the secondary proceedings since, depending on the answer to be given, creditors who have lodged claims in the main insolvency proceedings will, or will not, be eligible in the subsequent distribution of the insolvency estate in the secondary proceedings. An examination of the case-law of the Court of Justice of the EU shows that the

Court has not ruled on a case of this kind. Furthermore, the application of EU law is not so clear as to leave no scope for any doubt (*acte claire doctrine*, Case 283/81 — *CILFIT v. Ministero della Sanità*).⁵

17. On the one hand, for the purposes of interpreting Article 32(2) of the regulation the starting point must be the objective of opening secondary insolvency proceedings. Recital 19 [Or. 7] of the regulation states that secondary insolvency proceedings serve different purposes, besides the protection of local interests. Cases may arise, for instance, where the estate of the debtor is too complex to administer as a single unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State in which the proceedings were opened to the other States where the assets are located. For this reason, the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.
18. Recital 20 of the regulation emphasises that main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time.
19. According to recital 21 of the regulation, every creditor, who has his habitual residence, domicile or registered office in the Union, should have the right to lodge his claims in each of the insolvency proceedings pending in the Union relating to the debtor's assets. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.
20. It is clear from the above recitals that the objective of that regulation is to ensure efficient and effective cross-border insolvency proceedings,⁶ and equal treatment of creditors within the Union, and to facilitate the exercise of their rights.⁷

⁵ EU:C:1982:335.

⁶ Judgment of the Court of Justice in Case C-116/11, *Bank Handlowy and Ryszard Adamiak* (EU:C:2012:308).

⁷ Judgment of the Court of Justice in Case C-47/18, *Skarb Państwa Rzeczypospolitej Polskiej* (EU:C:2019:754).

21. The regulation sets out, for the matters covered by it, uniform rules on conflict of laws, which replace, within their scope of application, national rules of private international [Or. 8] law.⁸ Unless otherwise stated, the law of the Member State in which the proceedings are opened should be applicable (*lex concursus*), and this should apply both for the main proceedings and for local proceedings. Recital 23 of the regulation states that the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, and governs all the conditions for the opening, conduct and closure of the insolvency proceedings. Those requirements are met by Article 28 of the regulation, which establishes that, save as otherwise provided therein, the law applicable to secondary proceedings is to be that of the Member State within the territory of which the secondary proceedings are opened. What is covered by the applicable law is laid down in Article 4 included in the general provisions. This includes, *inter alia*, the rules governing the lodging, verification and admission of claims [Article 4(2)(h) of the regulation] and the rules governing the distribution of proceeds from the realisation of assets [Article 4(2)(i) of the regulation].
22. Beyond stating that the liquidators in the main and any secondary proceedings may lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed (and with the exception of the introduction of an additional condition and the reservation of the right of creditors), Article 32(2) of the regulation contains no provisions which show unequivocally how the lodgement of claims is to be treated. Similarly, it is not clear whether the time limits laid down in Slovenian law for the lodgement of creditors' claims, including the consequences of lodging claims out of time, also apply to claims lodged by liquidators pursuant to Article 32(2) of the regulation.
23. The ZFPPIPP does not govern the situation referred to in Article 32(2) of the regulation. Nor is this situation envisaged in the procedure for distributing the insolvency estate. In the general distribution of the insolvency estate, account is taken solely of the claims which, in insolvency proceedings, were lodged in good time,⁹ as well as preferential claims expressly mentioned and claims relating to the payment of taxes, which do not have to be lodged in the insolvency proceedings and are deemed to have lodged in good time.¹⁰ Those claims must be entered by the liquidator on the principal list or supplementary list of verified claims.

⁸ Recital 23 of the regulation.

⁹ Article 358 of the ZFPPIPP.

¹⁰ Article 296(6) of the ZFPPIPP.

CONCLUSION

24. The interpretation provided by the Court of Justice of the European Union will enable the court of appeal [Or. 9] to adopt a decision that is consistent with the objective pursued by Article 32(2) of the regulation.

QUESTION REFERRED

25. In the light of the foregoing, the Višje sodišče v Ljubljani refers the following question for a preliminary ruling, pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union, in conjunction with subparagraph (b) of the first paragraph thereof:

‘Is Article 32(2) of Regulation No 1346/2000 to be interpreted as meaning that the rules on the time limits for lodging creditors’ claims, and the consequences of lodging claims out of time under the law of the State in which the secondary proceedings are being conducted, apply to the lodgement of claims in secondary proceedings by the liquidator in the main insolvency proceedings?’

[omissis]

WORKING DOCUMENT