

Case C-723/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 December 2020

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

17 December 2020

Appellant on a point of law:

Galapagos BidCo. S.a r.l.

Respondents in the appeal on a point of law:

DE, as insolvency administrator of Galapagos S. A.

Hauck Aufhäuser Fund Services S. A.

Prime Capital S. A.

Subject matter of the main proceedings

Interpretation of Regulation (EU) 2015/848 with regard to the jurisdiction to open the main insolvency proceedings and with regard to the centre of the main interests in a case where the place of central administration is moved within the European Union

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU, in particular

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19, corrigendum in OJ 2016 L 349, p. 9) ('the Insolvency Regulation')

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1, repealed on 25 June 2017 by Regulation [EU] 2015/848) ('the 2000 Insolvency Regulation')

Questions referred

1. Is Article 3(1) of Regulation (EU) 2015/848 to be interpreted as meaning that a debtor company the statutory seat of which is situated in a Member State does not have the centre of its main interests in a second Member State in which the place of its central administration is situated, as can be determined on the basis of objective factors ascertainable by third parties, in the case where, in circumstances such as those in the main proceedings, the debtor company has moved that place of central administration from a third Member State to the second Member State at a time when a request to have the main insolvency proceedings opened in respect of its assets has been lodged in the third Member State and a decision on that request has not yet been delivered?
2. If Question 1 is answered in the negative: Is Article 3(1) of Regulation (EU) 2015/848 to be interpreted as meaning that:
 - (a) the courts of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to have insolvency proceedings opened retain international jurisdiction to open those proceedings if the debtor moves the centre of its main interests to the territory of another Member State after lodging the request but before the decision opening insolvency proceedings is delivered, and
 - (b) such continuing international jurisdiction of the courts of one Member State excludes the jurisdiction of the courts of another Member State in respect of further requests to have the main insolvency proceedings opened received by a court of that other Member State after the debtor has moved its centre of main interests to that other Member State?

Provisions of EU law cited

Article 126 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7) ('the Withdrawal Agreement')

Article 3(1) of Regulation (EU) 2015/848

Provisions of national law cited

Insolvenzordnung (Insolvency Code; 'the InsO')

Zivilprozessordnung (Code of Civil Procedure; ‘the ZPO’)

Facts and procedure

- 1 The present case concerns insolvency proceedings in respect of the assets of Galapagos S. A. (‘the debtor’), a holding company established in April 2014, entered in the Commercial and Companies Register in Luxembourg and having its registered office in Luxembourg (Grand Duchy of Luxembourg). The debtor does not have any employees.
- 2 In June 2019, the debtor contemplated moving its actual centre of administration to England. On 22 August 2019, its directors lodged a request before a court in the United Kingdom (‘the High Court’) to have insolvency proceedings opened in respect of the debtor’s assets.
- 3 The directors were replaced the following day by a new director, who set up an office for the debtor in Düsseldorf and started working there. The debtor did not withdraw the request to have insolvency proceedings opened before the High Court; rather, the proceedings were continued as a creditors’ process. A decision opening insolvency proceedings has not yet been delivered in that process. The request lodged with the High Court has not yet been adjudicated on by final decision.
- 4 In response to a request for the opening of insolvency proceedings lodged by the debtor with the Amtsgericht Düsseldorf (Local Court, Düsseldorf) acting as an insolvency court (‘the insolvency court’) on 23 August 2019, the latter ordered preservation measures by order of the same date and appointed the respondent in the appeal on a point of law, DE, as temporary insolvency administrator. As of 25 August 2019, the capital market and bondholders were informed that the centre of administration had been moved to Düsseldorf. Ruling on an appeal by creditors, the Amtsgericht Düsseldorf reversed its order on 6 September 2019 on grounds of a want of international jurisdiction and dismissed as inadmissible the debtor’s request to have insolvency proceedings opened.
- 5 On 6 September 2019, the other respondents in the present appeal on a point of law, Hauck Aufhäuser Fund Services S. A. and Prime Capital S. A., lodged, in their capacity as creditors, a request with the insolvency court to have insolvency proceedings opened in respect of the debtor’s assets. Ruling on that request, the insolvency court ordered preservation measures by order of 9 September 2019 and appointed DE as temporary insolvency administrator. It based its international jurisdiction on the fact that the centre of the debtor’s main interests was situated in Düsseldorf at the time when the request was lodged.
- 6 The appellant in the present appeal on a point of law, which is a subsidiary of the debtor, brought an appeal, as a creditor, against that order of the insolvency court before the competent Landgericht (‘Regional Court’). It contested the international jurisdiction, claiming that the debtor’s centre of administration had

been moved to England in June 2019. The Landgericht dismissed that appeal by order of 30 October 2019.

- 7 By the present appeal on a point of law, the appellant seeks to have the order of the insolvency court set aside and the request to have insolvency proceedings opened dismissed.

Grounds for the request

- 8 The success of the appeal on a point of law turns on a decision of the Court of Justice of the European Union ('the Court') on the interpretation of the Treaties.

First question referred

- 9 The success of the appeal on a point of law depends on the interpretation of Article 3(1) of the Insolvency Regulation.
- 10 The appeal on a point of law is admissible.
- 11 The insolvency court stated that it has jurisdiction because the debtor's centre of main interests ('COMI') was situated in Germany. Pursuant to the first sentence of the first subparagraph of Article 3(1) of the Insolvency Regulation, 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. As confirmed by the Landgericht, that centre was situated in Germany on 9 September 2019.
- 12 If either of the questions referred were to be answered in the affirmative, the present appeal on a point of law would have to be allowed. The decisive factor in answering the first question referred is whether the facts established justify the assumption that the centre of the debtor's main interests is situated in Germany.
- 13 Pursuant to the second sentence of the first subparagraph of Article 3(1) of the Insolvency Regulation, the centre of the debtor's main interests is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. According to that standard, the centre of the debtor's main interests was situated in Germany at the beginning of September 2019.
- 14 The question that arises is whether, in the determination of the centre of a debtor company's main interests, specific requirements must be imposed in order to prevent abusive conduct in circumstances such as those in the main proceedings.
- 15 Recitals 4, 5, 29 and 30 of the Insolvency Regulation which is now applicable contain statements regarding the prevention of abusive 'forum shopping'. Article 3(1) of the Insolvency Regulation contains an express definition of the centre of main interests and corresponding presumption rules.

- 16 In accordance with the case-law of the Court of Justice, a transfer of jurisdiction from the court originally seised to a court of another Member State would be contrary to the objectives pursued by the Insolvency Regulation if the debtor moves the centre of his main interests after submitting the request to have proceedings opened but before the decision to open them is delivered (see judgment of 17 January 2006, *Staubitz-Schreiber*, C-1/04, EU:C:2006:39, paragraph 22 et seq.).
- 17 It is not clear from the case-law of the Court of Justice whether specific requirements for preventing abusive forum shopping, which must be fulfilled in order for the moving of the place of central administration to be recognised as being determinative for the moving of the centre of main interests, can also be derived from the provisions of Article 3(1) of the Insolvency Regulation.
- 18 The appellant on a point of law takes the view that, owing to the element ‘on a regular basis’ in the second sentence of the first subparagraph of Article 3(1) of the Insolvency Regulation, only a place where the debtor company has either had its registered office or conducted the administration of its interests for more than three months prior to the request to have insolvency proceedings opened can enter into consideration as the centre of main interests. It submits that the element ‘administration ... on a regular basis’ presupposes an adequate degree of permanence and is not present if the establishment of a centre of administration is pursued at the same time as a request to have insolvency proceedings opened. Against this, the respondents in the appeal on a point of law contend that the requirement of administration on a regular basis is fulfilled if the administration is permanent.
- 19 If the Court of Justice were to answer the first question referred in the affirmative, it would have to be assumed in the present case that the debtor could not move the centre of its main interests to Germany after 22 August 2019.
- 20 For the purposes of the present proceedings, it is to be assumed that the debtor’s place of central administration was situated in England on 22 August 2019. In accordance with the Court’s case-law, this would mean that the centre of the debtor’s main interests was situated in England at the time when it lodged a request to have insolvency proceedings opened in respect of its assets with the English High Court, with the result that the latter court had international jurisdiction to open the main insolvency proceedings pursuant to the first sentence of the first subparagraph of Article 3(1) of the Insolvency Regulation.

– *Second question referred*

- 21 The answer to the second question referred will determine whether the fact that the centre of the debtor’s main interests was situated in Germany at the beginning of September 2019 results in the German courts having international jurisdiction to open the main insolvency proceedings pursuant to the first sentence of the first subparagraph of Article 3(1) of the Insolvency Regulation.

- 22 The international jurisdiction of the courts of a Member State to decide on the opening of main insolvency proceedings could continue to exist (*perpetuatio fori*) if the debtor moves the centre of its main interests to the territory of another Member State after lodging the request but before the decision opening insolvency proceedings is delivered. This aspect is the subject matter of part (a) of the second question referred.
- 23 With regard to Article 3(1) of the 2000 Insolvency Regulation, the Court of Justice has answered that part of the question and ruled that the provision is to be interpreted as meaning that there is continuing jurisdiction, which is intended to prevent, inter alia, abusive forum shopping (see judgment of 17 January 2006, *Staubitz-Schreiber*, C-1/04, EU:C:2006:39, paragraph 25). In view of the new recast Insolvency Regulation, the question arises as to whether, with regard to Article 3(1) of the Insolvency Regulation also, the Court of Justice will adhere to its previous case-law.
- 24 The continuing international jurisdiction of the courts of one Member State to open the main insolvency proceedings could exclude the jurisdiction of the courts of another Member State. That is the subject matter of part (b) of the second question referred.
- 25 The Insolvency Regulation proceeds on the assumption that there is only one set of main insolvency proceedings (see Article 3(3) and (4) of the Insolvency Regulation). Article 19 of the Insolvency Regulation binds all other Member States to the decision to open those proceedings. International jurisdiction to open the main insolvency proceedings pursuant to Article 3(1) of the Insolvency Regulation is therefore exclusive.
- 26 According to the case-law of the Court of Justice, the court of a Member State within the territory of which the centre of the debtor's main interests is situated at the time when the request to have insolvency proceedings opened is lodged retains jurisdiction to open those proceedings pursuant to Article 3(1) of the 2000 Insolvency Regulation if the debtor moves the centre of its main interests to the territory of another Member State after lodging the request but before the decision opening proceedings is delivered. A transfer of jurisdiction from the court originally seised to a court of another Member State would be contrary to the objectives pursued by the Regulation (see judgment of 17 January 2006, *Staubitz-Schreiber*, C-1/04, EU:C:2006:39, paragraph 29).
- 27 In that context, the question arises as to whether the continuing jurisdiction of the court originally seised excludes the international jurisdiction of the courts of another Member State in respect of further requests. If that is not the case, a court seised at a later stage could open main insolvency proceedings, by which the court originally seised would be bound, with the result that the latter could no longer open the main insolvency proceedings. This could deprive continuing exclusive international jurisdiction of its practical effectiveness.

- 28 In the present case, a request to have insolvency proceedings opened was lodged with the English High Court earlier than that lodged with the Amtsgericht Düsseldorf. As the centre of the debtor's main interests was situated in England at the time when the request was lodged, the Bundesgerichtshof (Federal Supreme Court, Germany) proceeds on the assumption that the High Court had international jurisdiction to open the main insolvency proceedings pursuant to Article 3(1) of the Insolvency Regulation.
- 29 The withdrawal of the United Kingdom from the European Union does not alter this. Article 126 of the Withdrawal Agreement provides for a transition period ending on 31 December 2020. It follows from the first subparagraph of Article 127(1) of the Withdrawal Agreement that the Insolvency Regulation continues to apply to and in the United Kingdom during the transition period.

WORKING DOCUMENT