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The Stay of Individual Executions as a Consequence of the Opening of Main Insolvency Proceedings inside the Scope of (EC) Regulation No. 1346/00: the European Court of Justice's Point of View

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Abstract: Since the EC Regulation No. 1346/00 entered into force, there have been few occasions for national Courts to decide on the consequences that the opening of main insolvency proceedings effects within the European judicial area. However, the recent judgment of the European Court of Justice (ECJ) of 21 January 2010 relating to the case No. 444/07 (*MG Probud Gdynia sp. z o.o.*) [*] dealt with this issue. Although in this decision the reasoning of the European Court of Justice is simple, the judgment is very interesting because it clarifies some crucial concepts for the proper functioning of cross-border insolvency proceedings. The ECJ stated that after the main insolvency proceedings are opened in a Member State, the competent authorities of another Member State – where no secondary insolvency proceedings have been opened yet – are not entitled to order enforcement measures on the debtor's assets. This conclusion is reached mainly in reliance on the "Principle of Law Applicable to the Procedure" (Artt. 4-17 Reg.). However, the same conclusion also seems to be arguable from a different point of view: stay of individual executions is an "own effect" of the judgment opening the main insolvency proceedings. This effect is to inferred directly from the mechanism of automatic recognition of this judgment provided by Art. 16 Reg. Indeed, the automatic and immediate recognition of the judgment opening the main insolvency proceeding is the main tool provided by the EC Reg. No. 1346/00 to ensure a proper functioning of multiple concurrent jurisdictions. Moreover, the automatic and immediate recognition is an expression of the principle that the insolvency proceeding have to have universal effect on all the debtor's assets wherever they are located within the European Union. According to Art. 17 Reg. the judgment opening the main proceedings is to have the same effect in all Member States as it has under the law of the State where it is rendered. These "effects" include the divestment of the debtor and the stay of individual executions. Indeed, the stay of

[*] The full text of the decision is available from the website of the European Court of Justice: *http://curia.europa.eu* (searching by case number).

individual executions derives directly from the immediate effectiveness of the divestment of the debtor of which it is a logical corollary. Even though not expressly stated in the EC Reg. No. 1346/00, this effect can be inferred by Artt. 16-20 Reg. Finally, the stay of individual executions after the judgment opening the main insolvency proceedings is to be accepted in all the Member States because it reflects the principle of *par condicio creditorum* which is one of the fundamental rules of any collective insolvency proceeding in all Member States.

Keywords: Cross-Border Insolvency – Main insolvency proceedings – Recognition – Universal Effects – Individual executions

1. Introduction

The question concerning what kind of effects – procedural and substantive as well – judgements opening main insolvency proceedings automatically produce within the European Judicial Area according to (EC) Regulation No. 1346/00[147] is not so easy to be solved.

Although the Insolvency Regulation specifically provides on this issue, its provisions are difficult to be interpreted and this determines that Courts of the EU Member States do not share the same opinion about how to apply them.

Recently the European Court of Justice took a position on one of the most important effects that the opening of insolvency proceedings produces that is the prohibition for individual creditors – after the declaration of insolvency – to get any kind of executive measures that could affect the assets of the debtor, wherever they are located within the European Union.

I am referring to the recent judgement of the European Court of Justice of 21 January 2010

[147] Council Regulation (EC) 1346/2000 of May 29, 2000 on Insolvency Proceedings (hereafter the "Insolvency Regulation"). The Regulation does not apply to Denmark.

in the case 444/07 (*MG Probud Gdynia sp. z o.o.*)[148].

This was the first time that the European Court of Justice dealt with this issue. Indeed, in the past the European Court of Justice focused especially on questions of jurisdiction concerning the interpretation of the so called COMI ("centre of a debtor's main interests").

Although in this decision the reasoning of the European Court of Justice seems to be quite simple, the judgement is very interesting since it clarifies some crucial concepts for the proper functioning of cross-border insolvency proceedings.

2. The case submitted to the European Court of Justice

First of all, I would like to summarize facts and reasoning of the judgement.

The case was about a company having its registered office in Poland (the *MG Probud*) and an establishment in Germany. On the 9th of June 2005, the competent Polish Court ordered the opening of an insolvency proceeding against the company. After that, on the 11th of June 2005, a German creditor of the company - a public administrative authority (the *Principal Customs Office*) - applied to the *Amtsgericht* Saarbrücken in Germany and achieved an attachment of financial assets of the company located there (mostly, sums of money held in the bank account of the debtor). That decision was appealed in Germany by the Polish trustee but the appeal was dismissed by an order of the *Landgericht* Saarbrücken.

The *Landgericht* Saarbrücken' judgement was motivated as follows: since an insolvency proceeding had been opened in Poland, it was necessary to prevent *MG Probud* from collecting assets located in Germany and transferring them to Poland. In other words, purpose of the German judgement was to protect the rights of domestic creditors, especially of the public ones. Moreover, the *Landgericht* Saarbrücken held that the opening of the insolvency proceedings against *MG Probud* did not prevent attachment of the company assets located in Germany.

In particular, the German judge refused to give automatic recognition (under the Art. 16 of the (EC) Regulation No. 1346/00) to the insolvency procedure opened in Poland, since he

[148] The full text of the decision is available from the website of the European Court of Justice: *http://curia.europa.eu* (searching by case number).

considered impossible to understand – from the copy of the opening judgement attached to the application by the foreign liquidator – whether the Poland insolvency proceedings would have fallen within the scope of the Insolvency Regulation[149].

Given the German decision, the Polish judge questioned whether the attachment effected by the German judge was lawful since according to the Polish law such measures are forbidden after the insolvency declaration[150].

In reaction to the judgements of the filed German Courts, the Polish Supreme Court made a petition to the European Court of Justice for a preliminary ruling. In that petition, the Polish Supreme Court asked the European Court of Justice to clarify the two following issues concerning the interpretation of the (EC) Regulation No. 1346/00.

The first question was whether, according to the (EC) Regulation No. 1346/00, after the opening of a main insolvency proceedings in a Member State, public administrative authorities can attach funds held in a bank account of the debtor in another Member State and thereby contravene the domestic (insolvency) regulation of the Member State where the main insolvency proceedings were opened. Indeed, according to the Art. 4 (1) of the Regulation, the law of the Member State where the proceedings are opened (*lex fori concursus*) regulates stages and effects

[149] The Insolvency Regulation only applies to those insolvency proceedings provided by each Member State which are expressly listed in the Annex A of the Regulation. To be included in this Annex the proceedings must meet certain conditions which are established in Art. 1 (1) (EC) Regulation No. 1346/00. According to this Article, the Regulation "*shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*". Because the list contained in this Annex is exhaustive, the definition of insolvency proceedings contained in Art. 1 (1) is not necessary for determining the scope of the Regulation's applicability. See, DE CRISTOFARO, *Il regolamento CE n. 1346/2000, relativo alle procedure d'insolvenza,* in FERRARI (edited by), *Le convenzioni di diritto del commercio internazionale*, Milano, 2002, 379; MOSS-SMITH, *Commentary on Council Regulation 1346/2000*, in MOSS-FLETCHER-ISAAC (edited by), *The EC Regulation on Insolvency proceedings. A commentary and annotated guide*, Oxford, 2009, 227; PANNEN, *Art. 1*, in PANNEN (edited by), *European Insolvency Regulation*, Berlin, 2007, 24; CAPONI, *Il regolamento comunitario sulle procedure di insolvenza*, in *FI*, 2002, V, 221; FUMAGALLI, *Il regolamento comunitario sulle procedure di insolvenza*, in *RDP*, 2001, 683.

[150] In Poland, Insolvency Proceedings are regulated by *Insolvency and Restructuring Act* («*Prawo upadlościowe i naprawcze*») of 28 February 2003. For the English version the Polish *Insolvency and Restructuring Act* can be found on the International Insolvency Institute' website: see http://www.iiiglobal.org/international/cross_border.html. According to Art 146 (1) and (2) *Insolvency and Restructuring Act: "enforcement proceedings, whether judicial or administrative, opened against the debtor before the declaration of insolvency are to be stayed by operation of law on the date of the declaration of insolvency and sums obtained in stayed enforcement proceedings which have not been paid out are to be transferred to the pool of assets in the insolvency".* In addition, Art. 146 (3) *Insolvency and Restructuring Act* provides: *"the same provisions apply where security has been provided in respect of the assets of the debtor within the framework of proceedings to secure claims"*. Finally, under Article 146 (4), *"once insolvency proceedings have been opened it is no longer possible to bring against the debtor enforcement proceedings relating to the pool of assets in the insolvency".*

of the insolvency proceedings[151].

The second question was whether, according to the Article 25 (1) of the (EC) Regulation No. 1346/00, a Member State, where secondary insolvency proceedings have not been opened yet, can refuse to give recognition to a judgement made in the Member State where the main insolvency proceedings had been opened.

The answer of the European Court of Justice to both questions was negative. Here are the grounds of the European Court of Justice' judgement.

Firstly, in light to the principle of "mutual trust" among EU Member States the European Court of Justice confirms that Member States are allowed to refuse recognition of judgements made in the main insolvency proceedings only for the specific grounds provided by the (EC) Regulation No. 1346/00. The European lawmaker reduced these grounds to the minimum necessary.

Secondly, the European Court of Justice categorically states that after the opening of the main insolvency proceedings in a Member State, public authorities of another Member State, where secondary insolvency proceedings have not been opened yet, are not allowed to ask for any attachment of the debtor's assets. As I am going to explain, this conclusion was reached mainly in reliance on the so called "principle of the law applicable to the insolvency procedure".

In order to understand the conclusions reached by the European Court of Justice and the role of the *"lex fori concursus"* rule in cross border insolvency within EU, it is firstly necessary to examine how a decision opening insolvency proceedings in a Member State is recognized in another Member State under the Insolvency Regulation.

[151] The general conflict of laws rule contained in Art. 4 (1) (EC) Regulation No. 1346/00 establishes that – *"unless otherwise provided by"* – the law of the State of opening (*lex fori concursus*) governs the insolvency proceedings in all of its stages and in all of its effects. The exceptions to the *lex concursus* are contained in Articles 5-15 (EC) Regulation No. 1346/00. These exceptions constitute a closed list. See, LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure di insolvenza*, Bari, 2008; DANIELE, *Legge applicabile e diritto uniforme nel regolamento comunitario relativo alle procedure di insolvenza*, in *RDIPP*, 2002, 33; VINCRE, *Il regolamento CE sulle procedure d'insolvenza e il diritto italiano*, in *RDP*, 2004, 213.

3. The Insolvency Regulation's System of Recognition: General Characteristics

Because of its so-called universality, the main proceeding opened under Art. 3 (1) of the Insolvency Regulation embraces all debtor's assets wherever they are located and affects all his creditors. As a consequence of its universality, the main proceeding and its effects have to be recognized in other States. Under the Insolvency Regulation, this universality is assured providing a mandatory recognition in all Member States[152].

The Insolvency Regulation's system of recognition is based on two important principles: on the one hand, the principle of "Community Trust" that should guide Member State in holding their mutual relations; on the other hand, the principle of the so-called "*favor recognitionis"*.

Technically speaking, giving recognition to a decision opening insolvency proceedings rendered in a Member State means to give effect to those insolvency proceedings in another Member State. According to the Insolvency Regulation, any decision opening insolvency proceedings given in a Member State will be automatically recognised in any other Member State without any special procedure. Pursuant to the Art. 25 (EC) Regulation No. 1346/00, the same rule applies also to the *"other decisions"* concerning (stages and end of) the insolvency proceedings.

Anyway, in order to understand the importance of the "*lex fori concursus"* rule to determine the effects of the insolvency order's recognition particularly with regard to the prohibition for creditors to open individual executions, it is necessary to start from the relationship between jurisdictions among Member States.

Between two opposite models – the *"universal"* one and *"territorial"* one – the Regulation preferred a compromise: a *"modified* or *mitigated universality"* model[153].

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[152] See VIRGÓS-GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, The Netherlands, 2004, 185.

[153] *Territorial* and *universal model* are the two models which have inspired each Member State' regulation on cross-border insolvency. They have different approach in solving the issues arisen by cross-border insolvency. See GIULIANO, *Il fallimento nel diritto processuale civile internazionale*, Milano, 1943, 78; BONGIORNO, *Osservazioni in tema di universalità e territorialità del fallimento*, in *Dir. fall.*, 1974, 261; and, more recently, BONGIORNO *Universalità e territorialità del fallimento (problemi antichi ma sempre più attuali)*, in *Dir. fall.*, 1991, 666; LUPONE, *L'insolvenza transnazionale. Procedure concorsuali nello Stato e beni all'estero*, Padova, 1995, 54; FLESSNER, *Il diritto fallimentare internazionale in Europa*, in *Dir. fall.*, 1991, 695; FLETCHER, *Insolvency in private international law: national and international approaches*, Oxford, 2005, 374; WESSELS, *International Insolvency Law*, Deventer, 2006, 241; DE CESARI–MONTELLA, *Le procedure di insolvenza nella nuova disciplina comunitaria – Commentario articolo per articolo del Reg. (CE) 1346/2000*, Milano, 2004, 5; FUMAGALLI, *Apertura della procedura principale, competenza giurisdizionale e riconoscimento della decisione*, in *G. comm*., 2007, 326. The so called *"mitigated universality"* model was adopted also

What does it mean?

On the one hand, it means that if the insolvency proceedings are opened in the Member State where the centre of the debtor's main interests, those proceedings are to be considered the *"main (insolvency) proceedings"*. Those ones have universal scope that is they are intended to embrace all the debtor's assets and to affect all creditors, independently of where they are located. On the other hand, *"mitigate universality"* model means that even though the main proceedings are already opened in a Member State, there is still the possibility – under certain conditions – to open other insolvency proceedings in other Member States where the debtor has any establishment. Those proceedings are called *"ancillary or secondary (insolvency) proceedings"* and their effect is territorially limited in the Member State where they are opened[154].

In the (EC) Regulation No. 1346/00, the relationship among jurisdictions of the Member States is described in terms of striking originality[155]. Indeed, exercise of concurrent jurisdictions concerning the same insolvent debtor is not only permitted but even actively promoted and encouraged. Therefore, it has been necessary to fix some binding rules that ensure that all the concurrent pending insolvency proceedings are properly coordinated[156].

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by *UNCITRAL Model Law on Cross-Border Insolvency,* adopted in 1997. The *UNCITRAL Model Law* inspired the Polish *Insolvency and Restructuring Act*, as amended in 2003, whose Part II is on international insolvencies. The *UNCITRAL Model Law on Cross-Border Insolvency* can be found on the International Insolvency Institute's website: http://www.iiiglobal.org/international/cross_border.html. About the Polish Act: see, VECK, *The Legal Responses of Canada and Poland to International Bankruptcy and Insolvency with a Focus on Cross-Border Insolvency*, in *Int. Insolv. Rev.*, 2006, 71.

[154] It has to be noted that each secondary insolvency proceedings involves only the assets of the debtor located in the State where the proceedings is opened (and there is a debtor establishment that allows opening an insolvency proceeding there). About the location of the debtor'assets, see Art. 2, g) (EC) Reg. No. 1346/00: SMART, *Rights in rem, article 5 and the EC Insolvency Regulation: an English perspective*, in *Int. Insolv. Rev.*, 2006, 27.

[155] The Regulation contains no provisions for solving conflicts of jurisdictions. However, from the Recital 22 of the Regulation, it seems that in case of jurisdiction conflict they could apply the *"principle of priority"*. See European Court of Justice, *Eurofood IFSC Ltd.*, 2 May 2006, C- 341/04, in *Fall.*, 2006, 1249; Leeds High Court of Justice, 16 May 2003, in *RDIPP*, 2004, 774; Commercial Court of Pointose, 26 May 2003, in *RDIPP*, 2004, 780; Cour d'Appel de Versailles, 4 September 2003, in *RDIPP*, 2004, 783. See FLETCHER, *Insolvency in private international law: national and international approaches* cit., 373; HUBER, *Probleme der Internationalen Zuständigkeit und des forum shopping aus deutscher Sicht*, in GOTTWALD (edited by), *Europäisches Insolvenzrecht – Kollektiver Rechtsschutz*, Bielefeld, 2008, 11; BACCAGLINI, Il caso *Eurofood*: giurisdizione e litispendenza nell'insolvenza transfrontaliera, in *Int'l Lis*, 2006, 126; DANIELE, *Il regolamento n. 1346/2000 relativo alle procedure di insolvenza: spunti critici*, in *Dir. Fall.*, 2004, 604; DI AMATO, *Le procedure di insolvenza nell'Unione Europea: competenza, legge applicabile ed efficacia transfrontaliera*, in *Fall.*, 2002, 730; DE CESARI, *Giurisdizione, riconoscimento ed esecuzione delle decisioni nel regolamento comunitario relativo alle procedure di insolvenza*, in *RDIPP*, 2003, 65; differently, MONTELLA, *Il conflitto di giurisdizione nel Regolamento Ce n. 1346/2000*, in *Fall.*, 2008, 1153; SAMORÌ, *Conflitti di competenza nell'apertura delle procedure concorsuali*, Napoli, 2002, 293.

[156] For this purpose, for example, it is meant the duty of liquidators of different and parallel pending insolvency proceedings to closely collaborate, especially exchanging relevant information. See *amplius,* WESSELS, *International Insolvency Law* cit., 248; TEDESCHI, *Procedura principale e procedure secondarie nel regolamento comunitario sulle procedure di insolvenza* cit., 549; FERRI, *Creditori e curatore della procedura principale nel regolamento comunitario*

However, the main rule that assures a proper application of concurrent jurisdictions – in order to preserve the integrity of bankruptcy assets and to respect the "*par condicio creditorum*" value – is the automatic recognition of insolvency judgements by a Court of a Member State[157].

Article 16 of the Regulation expressly provides that "*any judgement opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings*".

This provision is applicable to any decision opening an insolvency proceeding given in a Member State and that is (already) effective in that State[158].

This provision makes clear that the recognition of the judgement opening insolvency proceeding must be granted without meeting any further requirement even in case this is required by the domestic law of the Member State where the main insolvency proceeding is opened or where the recognition is asked. Therefore, to be recognized the judgement opening insolvency proceedings does not necessarily have to have *res iudicata* effect in the State where it is issued neither to obtain an *exequatur* in another Member State.

Furthermore, the opening judgement does not have to be published locally before being recognized; more precisely, although its publication can be required by a Member State where a debtor has an establishment (see Art. 21 (2)), this is not a precondition for the recognition[159].

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sulle procedure di insolvenza transnazionali, in *RDP*, 2005, 709.

[157] For a general analysis on the coordination between insolvency proceedings opened in different Member States, see EHRICKE, *Probleme der Verfahrenskoordination*, in GOTTWALD (edited by), *Europäisches Insolvenzrecht – Kollektiver Rechtsschutz*, Bielefeld, 2008, 129.

[158] PANNEN-REIDEMANN, *Art. 16* in Pannen (edited by), *European Insolvency Regulation*, cit., 304; FLETCHER, *Insolvency in private international law: national and international approaches* cit., 421; RICCI, *Il riconoscimento delle procedure d'insolvenza secondo il Regolamento Ce n. 1346/2000*, in *RDP*, 2004, 387; STARACE, *La disciplina comunitaria delle procedure di insolvenza: giurisdizione ed efficacia delle sentenze straniere*, in *RDI*, 2002, 295; CONSALVI, *Recognition and enforcement of judgements under the EC Regulation on insolvency proceedings*, in www.judicium.it; QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria – Modelli di riferimento e diritto interno*, Torino, 2007, 219; DE CESARI, *Giurisdizione, riconoscimento ed esecuzione delle decisioni nel regolamento comunitario relativo alle procedure di insolvenza* cit., 73; DE CESARI , *La disciplina comunitaria delle procedure di insolvenza: giurisdizione ed efficacia delle sentenze straniere*, in *RDI*, 2002, 304.

[159] The Insolvency Regulation contains some rules regarding the publication of the opening of the insolvency proceedings which is necessary in order to inform creditors and the general public of the legal situation of the insolvent debtor. According to Art. 21 (1) (EC) Regulation No. 1346/00, publication of the decision opening the proceedings in other Member States is optional. Firstly, under the Insolvency Regulations, the publication of the opening decision is up to the liquidator; secondly, the Insolvency Regulation doesn't impose a specific way to publishing the decision, but refers to law of each State where publication must be done. Pursuant to Art. 21 (2) (EC) Regulation No. 1346/00, the publication of the decision opening proceedings in a different Member State where the

However, the cited Article 16 raises two issues that have to be solved in order to understand when automatic recognition is possible. Firstly, it has to be identified what a "judgement opening insolvency proceedings" is[160]; secondly, it has to be determined when the judgement becomes effective under the domestic law of the Member State where it is made[161].

It is not so difficult to answer these both questions.

First of all, it has to be an opening decision falling within the Insolvency Regulation application' scope (*ratione materiae*)[162]. Article 1 (1) of (EC) Regulation No. 1346/00 lists a number of requirements the opening judgement must meet. In particular, the opening judgement has to be a judgement that opens collective insolvency proceedings, declares the insolvency *status* of the debtor and involves at least a partial divestment of a debtor (in addition to the appointment of a liquidator).

On the contrary, concerning the question when the opening judgement becomes effective, the (EC) Regulation No. 1346/00 refers to the law of the State of the opening proceedings. So, it depends on the domestic legislation that is involved in the specific case. This rule represents the primary consequence of the so-called "*extension model*" that inspired the Insolvency

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debtor has an establishment is compulsory only in the case that this is a specific requirement of the law of this Member State. In other words, any Member State within the territory of which the debtor has an establishment may require mandatory publication. See SAMORÌ, *Conflitti di competenza nell'apertura delle procedure concorsuali*, cit., 260; DE CRISTOFARO, *Il regolamento CE n. 1346/2000, relativo alle procedure d'insolvenza* cit., 394. On this issue, see also European Court of Justice, *Commission* c. *AMI Semiconductor Belgium VBA and others*, 17 May 2005, C-294/02, in *RDIPP*, 2005, 823 that stated that "*pursuant to Art. 17 (1) of the (EC) Regulation No. 1346/00 the opening of insolvency proceedings takes effect in the other Member States without the need for any notice to be given under Art. 40 of that Regulation*".

[160] The opening judgement must satisfy some requirements in order to be recognized automatically. These requirements have been specified by the European Court of Justice in the famous case *Eurofood IFSC Ltd.*, 2 May 2006, C-341/04, in *Fall.*, 2006, 1249. Moreover, that decision considered the appointing of a provisional liquidator as an opening of proceedings as to Art. 16 of the Regulation. Critical on this solution: FLETCHER, *Insolvency in private international law: national and international approaches* cit., 421; BACCAGLINI, Il caso *Eurofood*: giurisdizione e litispendenza nell'insolvenza transfrontaliera cit., 127.

[161] This question poses delicate problems of interpretation in those legal systems – in particular the Anglo-Saxon ones – where the opening judgements could have retroactive effects from the time when the court was applied to. This effect is also known as "relation back principle". However, in the *Eurofood* case, the European Court of Justice disregarded this kind of legal fictions: *amplius*, PANNEN, *Art. 3*, in Pannen (edited by), *European Insolvency Regulation* cit., 119; HUBER, *Probleme der Internationalen Zuständigkeit und des forum shopping aus deutscher Sicht* cit., 12; BACCAGLINI, Il caso *Eurofood*: giurisdizione e litispendenza nell'insolvenza transfrontaliera cit., 126.

[162] In the case here in comment, the German judge refused to recognize the Polish decision opening main insolvency proceedings exactly because he considered that decision out of the Insolvency Regulation scope. Moreover, it is to be noted that after the EU enlargement on 1st May 2004, the list of insolvency proceedings, winding-up proceedings and liquidators in the three Annexes to (EC) Regulation No. 1346/00 were amended by (EC) Regulation No. 603/05. Thanks to this amendment, now also the proceedings and liquidators provided in the new EU Member States are included in Insolvency Regulation' Annexes. See FLETCHER, *Insolvency in private international law: national and international approaches* cit., 358; PANNEN/REIDEMANN, *Art. 16*, in Pannen (edited by), *European Insolvency Regulation* cit., 307.

Regulation[163]. According to this rule, any effective decision opening main insolvency proceedings is recognized automatically and immediately as well.

If these two conditions are met – (there is the opening judgement and it is effective) –, the recognition of a judgement that opens an insolvency proceeding shall be immediate and automatic.

Like for the opening judgement, no further and specific formalities are required for the recognition of the so-called "*other judgements*" provided by Article 25 of the (EC) Regulation No. 1346/00. Moreover, the same system of recognition should be applicable even for the decisions made during the insolvency proceeding or in order to declare the end of it.

From this point of view, the European Court of Justice clarifies in case No. 444/07 (*MG Probud Gdynia sp. z o.o.*) that the Member States have to grant automatic recognition to all these judgements – the opening judgement and the other ones – (see point 46 of the European Court of Justice decision). Moreover, it is important to point out that to define what a "decision relating to the conduct and closure of the proceedings" is represents a crucial, but hard issue to be solved. Unfortunately, in the case here in comment, the European Court of Justice did not spend any word in order to clarify this issue. So, it is still unclear which decisions the Art. 25 (1) of the Regulation is referred to[164].

However, judgements provided by the (EC) Regulation No. 1346/00 can have different effects (declaratory or executive). Depending on the effect invoked, the Regulation provides different procedures to make a judgement effective in other Member States. So, it happens that judgements made during the insolvency proceeding could also be submitted to an *exequatur*

[163] Two are the possible opposite models that could be adopted to give effect in a State the decision given in another one: the "*assimilation model*" and the "*extension model*". As for the former, the foreign decision has the same effects as a domestic one; as for the latter, the foreign decision is accepted as it is, on its own terms and with its own effects. So, in the "*extension model*" the effects of the insolvency proceedings depend on the applicable law. However, according to Art. 17 (1) (EC) Regulation No. 1346/00 "*the judgement opening the proceedings referred to in Art. 3 (1) shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings"*. See ATTARDI, *La nuova disciplina in tema di giurisdizione italiana e di riconoscimento delle sentenze straniere*, in *RDC*, 1995, 755; CONSOLO, *Nuovi problemi di diritto processuale civile internazionale*, Milano, 2002, 27; GOTTWALD, *Le insolvenze trans-frontaliere: tendenze e soluzioni europee e mondiali*, in *RTDPC*, 1999, 157; VIRGÓS-GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice* cit., 191).

[164] On this issue see RIEDEMANN, *Art. 25*, in Pannen (edited by), *European Insolvency Regulation* cit., 375, "judgements concerning the course of insolvency proceedings are those rendered by the court during the course of proceedings for the purpose of conducting hearings/negotiations, for structuring a phase of the proceedings, or for fostering the progression of the proceedings, e.g. the appointment or dismissal of the liquidator or the imposing of certain disposal restriction on the debtor".

application, according to the Articles from 38 to 58 of the (EC) Regulation No. 44/01 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters. More precisely, the *exequatur* will be required, if the judgement is claimed to have executive effect in another Member State[165].

So, the fact that the (EC) Regulation No. 1346/00 does not require an *exequatur* for the opening judgement and provides that this judgement has to be automatically recognized in other Member States is very significant. It makes clear the real nature of this judgement. This fact shows at least that the opening judgement is not considered as an executive measure[166]. Even though insolvency proceedings could be described as a collective execution, the automatic recognition of an opening judgement does not mean that in this way the *forum* where the insolvency proceedings are opened exercises directly an executive power in other Member States. To recognize an opening insolvency proceedings judgement implies only to give the recognition to the declaratory effects of that judgement[167].

[165] The Regulation refers to the *exequatur* procedure regulated by Art. 31 – 51 (with the exception of Art. 34 (2)) of 1968 Brussels Convention, which was replaced by Council Regulation No. 44/2001 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters. From those dispositions, it is clear that the bankruptcy decisions issued outside the European Judicial Area have to obtain an *exequatur* in the Member State where they would have executive effect. See FABIANI, *Riconoscimento di decisioni dichiarative di fallimento e resistenze giurisprudenziali municipali*, in *Int'l Lis*, 2008, 73; PERSANO, *L'esecuzione delle decisioni nel Regolamento Ce n. 1346/2000 del 29 maggio 2000 relativo alle procedure di insolvenza*, in *DCI*, 2006, 799.

[166] See REINHART, *Art. 25 EuInsVO*, in KIRCHHOF-LWOWSKI-STÜRNER (edited by), *Münchener Kommentar*, III, München, 2003, 899 who suggests that it is not necessary to enforce the judgement opening insolvency proceedings because it is not to be considered as an enforceable remedy. Also the European Court of Justice seems to support this opinion in the case here in comment. Indeed, whenever the European Court of Justice speaks about "enforcement of judgements", it refers exclusively to those judgements concerning the course of the proceedings and systematically speaking judgements of opening insolvency proceedings could not be considered a decision concerning the course of those proceedings. However, this has been the minority opinion so far. Precisely, prevailing opinion holds that "with respect to all of the legal consequences going beyond the opening itself, judgements opening insolvency proceedings are also to be enforced in accordance with Art. 25 (1) (EC) Regulation No. 1346/2000": see RIEDEMANN, *Art. 25*, in Pannen (edited by), *European Insolvency Regulation* cit., 382. Indeed, most of the authors consider that it is only for European legislator inaccuracy that the Art. 25 (1) does not refer expressly to opening judgements. In other words, the concordance of Art. 16 to Art. 25 is assured as follows: "the need for a procedure of *exequatur* is determined by the nature of the effects which the foreign decision is desired to have in the forum (enforcement or not), and not by where this decision is contained (in the decision opening proceedings itself or in a different decision). Consequently, if the decision opening the insolvency proceedings contains order which are enforceable, they would be enforced in other Member States under Art. 25, and not under Art. 16, which only deals with recognition": see VIRGÓS-GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice* cit., 209; WESSELS, *International Insolvency Law* cit., 249.

[167] See SAMORÌ, *Conflitti di competenza nell'apertura delle procedure concorsuali* cit., 253; MORELLI, *Diritto processuale civile internazionale*, Padova, 1954, 308.

4. The stay of individual executions as a consequence of the opening of main insolvency proceedings in application of *lex fori concursus* provisions

The opening of a main insolvency proceeding in a Member State produces a range of effects. Among them, there is the creditor'duty to assert his claims in accordance to the so-called "concurrency of creditors" principle. In the case here in comment, the European Court of Justice addressed this issue focusing on the role of the *lex fori concursus.*

As far as the immediate effects that the recognition of the judgement opening a main insolvency proceeding produces in all Member States is concerned, some distinctions are to be pointed out.

According to the Article 17 of the (EC) Regulation No. 1346/00, it has to distinguish two cases: one the one hand, the case where only a main insolvency proceeding has started; on the other hand, the case where in addition to the main insolvency proceedings also secondary proceedings have been opened. Here I would like to refer only to the first case, because it was the one in which the EU Court of Justice had to decide.

If only a main insolvency proceeding has started, Article 17 (1) of the (EC) Regulation No. 1346/00 states that the opening judgement has the same effects in all the Member States as it has under the law of the *forum* State (i.e. the domestic law of the State where the insolvency proceedings were opened)[168].

Regulating the insolvency judgment' recognition, Art. 17 (1) (EC) Regulation No. 1346/00 is a specific expression of the general "conflict of laws rule" provided in Art. 4 that disciplines procedural aspects regulated by *lex fori concursus*. Particularly, there is a need to focus on Art. 4 (2), f) of (EC) Regulation No. 1346/00, which states that except for "*lawsuits pending*" the law of the State where insolvency proceedings are opened shall determine "*the effects of the insolvency proceedings on proceedings brought by individual creditors*"[169].

[168] However, it should be noted that the applicability of the *forum* State law is subject to many exceptions: see from Art. 5 to Art. 15; one of the most important exception are concerning rights *in rem* of third parties; set-off of mutual debts, and retention of title.

[169] It has to be noted that Art. 4 (2), f) seems to be in contrast with Art. 15 (EC) Regulation No. 1346/00 As already mentioned, according to Art. 4 (2), f) the *lex fori concursus* determines the effects of the insolvency procedure on proceedings brought by individual creditors except for "*lawsuits pending*". According to Art. 15, the latter ones are regulated by the law of the State where they are pending (rule also known as *lex fori processus*). Prevailing opinion

In the opinion of European Court of Justice, simply applying the mentioned Regulation's provisions, insolvency proceedings opened against *MG Probud* and its effects have to be entirely regulated by the Polish law.

It is certain that, as a consequence of the principle of universality of insolvency procedure, the main insolvency proceedings encompass all the debtor's assets. Moreover, the universal character of insolvency proceedings means that these proceedings not only determine the legal consequences on debtor's assets situated in other Member States, but also fix the measures that could be pleaded to affect those assets.

Indeed, the case here in comment is about one of the most relevant and characteristic effect of the opening of insolvency proceedings, especially of the bankruptcy ones. I am referring to the prohibition for individual creditors to bring any sort of executive actions on bankruptcy assets, even when those assets are situated outside the *forum* where the main insolvency proceeding is opened. In the case, the European Court of Justice held that one implicit effect of recognizing an insolvency judgement would be the stay of any individual execution brought in the whole European Judicial Area, if so provided by the law applicable to the insolvency proceeding.

On the ground of this consideration, the European Court of Justice pronounced on the merits as follows: because Polish Insolvency Law forbids any execution proceeding on the insolvency assets after a main insolvency proceedings has been opened, the German public authorities had to be considered barred from rendering any executive measure on the bankrupted Polish company's assets located in Germany. Indeed, the appointment of the Polish liquidator should have already stopped any individual execution, which was pending at the same time there.

In my opinion, the European Court of Justice decision should be fully approved. In fact, it is clear that if creditors could recover their credits individually without intervening into the insolvency proceedings, the principle of *par condicio creditorum* would be irremediably breached. In other words, admitting any individual executive action when a main insolvency proceeding is pending means to nullify the principal function of collective proceedings, that is to assure that all

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holds that the contrast between Art. 4 (2), f) and Art. 15 has to be solved distinguishing lawsuits brought to obtain an enforceable remedy (including provisional measures) and lawsuits on the merits of a case. According to this distinction, Art. 15 concerns only the latter ones. See, *ex multis,* DANIELE, *Il regolamento n. 1346/2000 relativo alle procedure di insolvenza: spunti critici* cit., 616; FLETCHER, *Insolvency in private international law: national and international approaches* cit., 282; LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure di insolvenza* cit., 304.

creditors have are treated equally and fairly.

Undoubtedly purpose of the German judgement was to protect German creditors – especially if Public Authorities (in the case, the *Principal Customs Office*)[170] – from the difficulties that they could have met laying their claims in the Polish insolvency proceedings[171]. Indeed, there is no doubt that it could be difficult for creditors who reside in another States than the opening one, to take part to the insolvency proceedings. This is because firstly they have to lay their claims individually, secondly they are subjected to a law – the *lex fori concursus* – that in most of the cases they don't know at all[172].

However, such a consideration is manifestly against Insolvency Regulation' purpose and could not be justified even thinking of the different treatment that creditors could have because of a strict application of *lex fori concursus.* In fact, in order to (partially) avoid this risk the Insolvency Regulation provides special rules on the applicable law to certain categories of claims that are considered worth of an higher protection[173].

Although the European Court of Justice conclusion is to be fully approved, it is my opinion that the reference to the *lex fori concursus* is not a decisive argument to justify the stay of individual executions, especially when these were brought after the opening of the main

[170] Indeed, under the Art. 39 of the (EC) Regulation No. 1346/00 tax and social security authorities of Member States are considered as "common creditors". So, any provisions in a Member State that provided differently are superseded by Art. 39. As a consequence, any claim of those authorities is disciplined by the *lex fori concursus*. See, WESSELS, *International Insolvency Law* cit., 250; DE CRISTOFARO, *Il regolamento CE n. 1346/2000, relativo alle procedure d'insolvenza* cit., 383. The same principle was affirmed by the European Court of Justice in the case *Commissione* c. *AMI Semiconductor Belgium VBA and others*, 17 May 2005, C-294/02, in *RDIPP*, 2005, 823.

[171] As ground of the order, the *Landgericht* Saarbrücken stated that "as insolvency proceedings had been opened in Poland, there was reason to fear that those responsible within *MG Probud* would shortly collect the sums payable and transfer the corresponding amounts to Poland in order to prevent the German authorities from having access to them". From this point of view, the German judge seems to be influenced by the old German Insolvency Law. Indeed, when the *KO* was in force, its Section 237 allowed individual execution measures on the debtor's assets placed in Germany even after the commencing of an insolvency proceedings abroad. There is no provision like Section 237 in the currently in force *InsO*, that forbids any individual execution after insolvency proceedings are opened. See GATTI-KRAUS, *Efficacia delle sentenze straniere dichiarative di fallimento nel diritto di alcuni Stati europei*, in *RTDPC*, 1964, 725, nt. 41; HANISCH, *Report for Germany*, in FLETCHER (edited by), *Cross-Border Insolvency: National and Comparative studies*, Tübingen, 1992, 115; EBENROTH, *Die Inlandswirkungen der ausländischen lex fori concursus bei Insolvenz einer Gesellschaft*, in *ZZP*, 1988, 132 ss.; BACCAGLINI, *Il riconoscimento e l'esecuzione della sentenza fallimentare straniera in Italia* cit., 166.

[172] *Lex fori concursus* has to be applied to the lodging, verification, and admission of claims: see MÉLIN, *La posizione dei creditori nelle procedure concorsuali aperte nell'Unione Europea ai sensi del Regolamento n. 1346/2000 relativo alle procedure di insolvenza*, in *Dir. fall.*, 2004, 1118; VINCRE, *Il regolamento CE sulle procedure d'insolvenza e il diritto italiano* cit., 242.

[173] See Recital No. 11 of the Regulation. So, the consequences of the opening of main insolvency proceedings are not entirely under a single legal system. Consequently, from this point of view, the universality of the procedure is reduced: see from Art. 5 to Art. 15 (EC) Regulation No. 1346/00.

insolvency proceedings.

Even though the final version of the Regulation does not forbid expressly individual executive proceedings, this prohibition can be inferred by systematically interpreting some of its dispositions. Indeed, in my opinion, those dispositions could be considered as an expression of a general rule provided by the Insolvency Regulation: prohibition of any individual executive action is an insolvency judgement's own effect that derives automatically and immediately from its recognition.

5. The stay of individual executions as an own effect of the insolvency judgements

As previously suggested, in my opinion, the prohibition of individual executions after the opening of a main insolvency proceedings in a Member State is an own effect of the insolvency judgement. This consideration is primarily founded on systematic reasons.

As mentioned, because of the universal character of the main insolvency proceedings, these proceedings embrace all the debtor's assets, wherever they are located. Moreover, the open of a main insolvency proceedings immediately causes the divestment of the debtor.

The divestment of the debtor takes effect immediately over all his assets, regardless of where they are located[174]. It is one of the most important effects of the judgement opening main proceedings and it derives directly from the recognition.

Moreover, within the EU system, the divestment of debtors plays a double role: on the one hand, it is an effect of the automatic recognition of the opening judgement; on the other hand, it is a necessary condition to get the recognition of the opening judgement. Indeed, the joint provisions of Articles 2 (1), f) and 1 (1) of the (EC) Regulation No. 1346/00 reveal that to be recognizable an opening judgement has to cause the opening of a collective procedure involving at least the partial divestment of the debtor[175].

From this point of view, it would be a non-sense to say that from the opening decisions the

[174] The liquidator has the power to remove debtor's assets from the territory of the Member State where they are situated. According to Art. 18 (3) of the Regulation, the liquidator shall comply with the law of the Member State within the territory that he intends to take action.

[175] See WESSELS, *International Insolvency Law* cit., 269.

insolvent debtor immediately looses his right to dispose of his assets (because they have to be given to the collective procedure) and at the same time to permit insolvency creditors to bring (or go on in) individual executions[176].

Under the Regulation, this "stay effect" is an automatic and immediate consequence of the divestment of the debtor. Indeed, it is a logical corollary of the debtor's divestment.

It is important to remember that this stay is a typical effect provided in any domestic insolvency legislation, because it reflects the principle of *par condicio creditorum*, which rules any collective insolvency proceedings.

As said, actually there is no specific provision on the stay effect of the individual executions in the (EC) Regulation No. 1346/00. Nonetheless, by a systematic interpretation of the Regulation, it is clear that the judgement opening a main insolvency proceeding causes the automatic and immediate stay of individual executions.

So, in my opinion, taken apart the issue about the nature (declaratory or executive?) of this kind of effect, to recognize opening judgements without staying individual executions would totally nullify the rationale of the recognition system provide by the Regulation.

In conclusion, two are the arguments my opinion is based on. Firstly, I think that the stop of individual executions is an effect that must be inferred directly by the mechanism of automatic recognition of the opening judgement fixed by the Article 16 of the (EC) Regulation No. 1346/00. The fundamental reason why the Regulation cuts any gap between the moment when the opening judgement takes effect in the State where it is issued and that one of its recognition in all the Member States, is to prevent that in this time the creditors could obtain executive measures upon the assets of the debtor declared insolvent[177].

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[176] Indeed, from the opening of main insolvency proceedings the liquidator takes control of the assets of the debtor. Pursuant to Art. 18 (1) (EC) Regulation No. 1346/00, the liquidator also may transfer debtor's assets from the Member State where they are located to the Member State of the opening, except the restrictions imposed by Art. 5 and 7. Therefore, even from this point of view, it would contradictory to admit individual executions after the opening: see, *amplius,* LEANDRO, *Il ruolo della lex concursus nel regolamento comunitario sulle procedure di insolvenza* cit., 301. Anyway, liquidator's powers in other Member States are subjected to three types of restrictions. More precisely, the liquidator can not use his power to nullify: a) the effects deriving from the opening of territorial proceedings; b) conservative remedies granted ancillary to the opening of territorial proceedings. Finally, under the Art. 18 (3), he has to comply with the law of the Member State where he brings an action, "*in particular with regard to procedures for the realisation of assets*". See FERRI, *Creditori e curatore della procedura principale nel regolamento comunitario sulle procedure di insolvenza transnazionali* cit., 712.

[177] See FLETCHER, *Insolvency in private international law: national and international approaches* cit., 421; VIRGÓS-GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice* cit., 193, MONTANARI, *La Cour de cassation apre ai*

However, this conclusion seems justifiable even from a different point of view.

The same conclusion can be reached on the basis of Article 20 which provides a "*duty to return*" by those creditors who have satisfied their claims totally or partially "*by any means*" and "*in particular through enforcement*" brought after a bankruptcy order has already be issued. The creditors cannot obtain total or partial satisfaction of their claims by individual execution because this represents a breach of the *par condicio creditorum* rule, which insolvency proceedings are based on. If the creditors have brought individual executions after a bankruptcy order, they must return "what has been obtained"[178].

The objective of this rule is clearly to the protect the principle of *par condicio creditorum.* Moreover, the stay of individual executions has to be considered as an own effect of the decision that opens a main insolvency proceedings in a Member State and that this effect finds, of a uniform discipline in the Insolvency Regulation[179].

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rimedi in personam contro l'azione esecutiva promossa dal singolo creditore concorsuale sui beni esteri del fallito, in *Int'l Lis*, 2004, 79.

[178] See DI AMATO, *Le procedure di insolvenza nell'Unione Europea: competenza, legge applicabile ed efficacia transfrontaliera* cit., 700; MÉLIN, *La posizione dei creditori nelle procedure concorsuali aperte nell'Unione Europea ai sensi del Regolamento n. 1346/2000 relativo alle procedure di insolvenza* cit., 1120; DE CRISTOFARO, *Il regolamento CE n. 1346/2000, relativo alle procedure d'insolvenza* cit., 388.

[179] See DE CRISTOFARO, *Op. ult cit.*, 388.

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