

# Staubitz-Schreiber case – preliminary ruling

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*Moving the centre of main interests after request for opening insolvency proceedings is lodged, yet before opening of insolvency proceedings.*

The European insolvency regulation (EIR or Regulation) defines the rules of jurisdiction for opening insolvency proceedings with cross-border effects and entered into force on 31 May 2002. According to Article 3 EIR, the main insolvency proceedings must be opened in the jurisdiction of the European member state (Member State) in which the debtor has its centre of main interests (COMI). The law of the Member State in which the main insolvency proceedings are opened governs the main insolvency proceedings.<sup>1</sup> The opening of the main insolvency proceedings is recognised by the other Member States and has effect in those other Member States.<sup>2</sup> It is therefore important where the main insolvency proceedings are opened, and thus where the COMI of the debtor is.

Although the EIR is considered to be a firm step forward for European insolvencies, it does not hold all the answers to the questions that may arise within the context of the Regulation. The preliminary ruling of the Court of Justice of the European Communities in the *Staubitz-Schreiber* case is the first preliminary ruling on the explanation of a part of the Regulation.<sup>3</sup> The question referred to the Court of Justice for a preliminary ruling was:

'Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?'

The Court of Justice ruled that the court of the Member State where the COMI of the debtor is situated at the time when the debtor lodges the request to open insolvency proceedings, retains jurisdiction to open those proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after lodging the request but before the proceedings are opened.

## Case description

Suzanne Staubitz-Schreiber lived in Germany, where she operated a telecommunications equipment and accessories business as a sole trader. On 6 December 2001 she lodged a request for the opening of an insolvency proceedings at the Amtsgericht-Insolvenzgericht Wuppertal. On 1 April 2002 she moved from Germany to Spain so that she could live and work in Spain. On 10 April 2002 the Amtsgericht rejected her request, judging that there were not enough assets. Staubitz-Schreiber appealed this judgment at the Landsgericht Wuppertal. The Landsgericht Wuppertal dismissed her appeal by orders of 14 August 2002 and 15 October 2003 on the ground that the German court, in accordance with Article 3(1) EIR was not competent to open her insolvency proceedings, because her COMI was in Spain.

Article 3 EIR lays down the following rules on international jurisdiction:

- (1) The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
- (2) Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he or she possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
- (3) Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

- (4) Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:
- (a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or
  - (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

#### **Request for preliminary ruling by the Bundesgerichtshof**

Staubitz-Schreiber appealed again and brought the case before the Bundesgerichtshof, the German court of final appeal. She took the position that the question of jurisdiction and more specifically of the COMI should be established per the date that the request for the opening of the insolvency proceedings was lodged. The Bundesgericht decided that before judging this matter, it would first refer the question for preliminary ruling to the Court of Justice and suspended the proceedings until the preliminary ruling was given.

#### **Preliminary ruling by the Court of Justice of the European Communities**

The Court of Justice first deals with the applicability of the Regulation to this particular case. The request for the opening of insolvency proceedings was lodged by Staubitz-Schreiber on 1 December 2001, ie before the Regulation entered into force. Pursuant to Article 43 EIR the Regulation is applicable to insolvency proceedings that are opened after the Regulation entered into force. The Court of Justice explains that the Regulation is applicable if before its entry into force on 31 May 2002 no judgment opening insolvency proceedings has been delivered, even if the request to open proceedings was lodged before that date. This is the case here, says the Court of Justice, since the request was lodged on 1 December 2001, yet no judgment opening insolvency proceedings was delivered before 31 May 2002 and therefore the jurisdiction must be judged in accordance with Article 3(1) EIR.

Article 3(1) does not explain whether or not the court of a Member State remains competent if a debtor moves to another Member State after he or she lodges a request to open insolvency proceedings, but before the judgment opening insolvency proceedings has been delivered.

Transferring the jurisdiction in this situation from one Member State to another after the COMI is moved is not in line with the objectives of the Regulation, according to the Court of Justice.

The Court of Justice refers to the fourth recital in the preamble to the Regulation in which it is expressed that it should be prevented that parties try to seek ways to profit from the differences in the legal systems in the Member States (forum-shopping). This objective of the Regulation will not be met if a debtor would be able to move its COMI between the request and the actual opening of insolvency proceedings and by that transferring jurisdiction.

Such transfer of jurisdiction would also be in conflict with the second and eighth recitals in the preamble to the Regulation. These recitals express the objective of the Regulation to have efficient and effective cross-border proceedings. A transfer of jurisdiction would cause the creditors to be obliged to continuously pursue their debtor wherever the debtor chooses to establish himself or herself more or less permanently and would often mean in practice that the proceedings would be prolonged.

Moreover, says the Court of Justice, retaining jurisdiction with the court that received the first request will provide the creditors with greater judicial certainty. They have assessed their position in the event of their debtor's insolvency on basis of the COMI of their debtor at the moment they entered into a relationship with him or her.

This is, in my opinion, only partially true. If the debtor had moved its COMI to another Member State before a request to open insolvency proceedings was lodged (either by himself / herself or by his or her creditors), the jurisdiction would be with the court in the Member State to which the debtor had moved. In that situation as well, the creditor would have assessed his or her position on basis of the former COMI.

The Court of Justice ends with the following consideration:

'... the universal scope of the main insolvency proceedings, the opening, where appropriate, of secondary proceedings and the possibility for the temporary administrator appointed by the court first seised to request measures to secure and preserve any of the debtor's assets situated in another Member State constitute, moreover, important guarantees for creditors, which ensure the widest possible coverage of the debtor's assets, particularly where he [or she] has moved the centre of his [or her] main interests after the request to open proceedings but before the proceedings are opened'.

Although the objective of this consideration is not entirely clear to me, it seems that the Court of Justice wants to express the importance for creditors to preserve their rights to their debtors' assets by opening insolvency proceedings and that this should not be affected by any possibility for the debtor to undermine this by moving its COMI.

On these grounds the Court of Justice rules: 'Article 3(1) of the Regulation must be interpreted as meaning that the court 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 open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.'

#### **Final remarks**

This first preliminary ruling of the Court of Justice of the European Communities is clear and provides insolvency practitioners some grip in determining the COMI of debtors in case the debtor moves its COMI between lodging a request to open insolvency proceedings. Now the waiting is for the second

preliminary ruling of that bigger case, the Eurofood (Parmalat) request by the Irish Supreme Court for a preliminary ruling on inter alia the question of whether appointment of a provisional administrator qualifies as the opening of insolvency proceedings, and on the determination of the COMI of group companies (subsidiaries) in different Member States. The opinion of the Advocate General was delivered on 27 September 2005 and the ruling is expected to be delivered on 2 May 2006.

#### **Notes**

- 1 Article 4 EIR. Articles 5 through 15 EIR provide some exceptions to this general rule.
- 2 Articles 16 and 17 EIR.
- 3 Judgement of the Court of Justice of the European Communities dated 17 January 2006, case C-01/04. To be found on [www.curia.eu.int](http://www.curia.eu.int).