ECJ Rules on Secondary Insolvency Proceedings

On November 22nd, the European Court of Justice delivered its judgment in *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.* (Case C-116/11).

The reference was made in the context of proceedings relating to the opening of insolvency proceedings, in Poland, further to an application made by Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak, in respect of Christianapol sp. z o.o., a company governed by Polish law in respect of which rescue proceedings (*procédure de sauvegarde*) had previously been opened in France.

The main proceedings opened in France had a protective purpose. Article 3(3) of the Insolvency Regulation provides that any secondary proceedings opened subsequently must be winding-up proceedings. This raised two problems.

Do protective proceedings preclude winding-up secondary proceedings?

The first was whether it would be logical to allow the opening of secondary liquidation proceedings when insolvency officials are trying to rescue the business in the country of the main proceedings. Should it follow that, in such a case, the opening of main proceedings precludes the opening of secondary proceedings?

The ECJ rules that neither Article 27, nor Article 3(3) makes any distinction according to the purpose of the main proceedings, and that therefore secondary proceedings may always be opened. They are to be liquidation proceedings, but the Regulation affords various tools allowing the insolvency official appointed in the main proceedings to influence the evolution of the secondary proceedings.

The European lawmaker is currently considering reforming the Insolvency Regulation and allowing secondary proceedings, whenever opened, to be protective in character.

What if the main proceedings are pre-insolvency proceedings?

The second issue was that the French proceedings were not technically speaking insolvency proceedings. They were pre-insolvency proceedings. *La procédure de sauvegarde* is available if the business meets financial difficulties, but the debtor

needs not be insolvent.

A preliminary issue was whether such proceedings fell within the scope of the Regulation. France has put them on the Annex. The Court underlines it, but insists that the merits of the inclusion in the Annex were not the subject matter of any question referred to the Court. As a consequence, it is to be considered that *Sauvegarde* was an insolvency proceedings in the meaning of the Regulation.

The problem, however, was that the French court had not, by definition, ruled on whether the business was insolvent. Could the Polish court rule on the issue, then? The ECJ decides that it may not.

Holding:

1. Article 4(2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended by Council Regulation (EC) No 788/2008 of 24 July 2008, must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.

2. Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.

3. Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.