

MG Probud Gdynia sp. z o.o.

[Case C-444/07 MG Probud Gdynia SP Zoo](#)

21st January 2010

Reference for a Preliminary Ruling to EU by Poland: Polish company - German branch

Court of Justice of the European Union

Key Words

Judicial cooperation; recognition of insolvency procedure; EU Insolvency Regulation 1346/2000; attachment order; refusal of recognition.

Summary of Facts of the Case

MG Probud, a company active in the building sector whose registered office was located in Poland, was declared insolvent by a Polish court on 9 June 2005 where main insolvency proceedings were opened. MG Probud also had a German branch engaged in construction work [para 16] although secondary proceedings were not opened in Germany.

On 11 June 2005, an attachment order was made by a local German court against assets held by some banks and of other claims of the debtor against German parties with whom it had entered into contracts [para 17]. An appeal was lodged against this decision.

In the order dismissing the appeal against the attachment order, the German court 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.’ [para 18] The German court further contended that the opening of insolvency proceedings in Poland should not prevent an attachment order being made and enforced in Germany; whereas, the Polish court questioned whether the attachment order was lawful at all given the applicable law to the main insolvency proceedings should be Polish law, which does not allow an attachment after a declaration of insolvency [para 19].

The Polish court referred two questions to the CJEU [para 20]:

1. In light of the rules under the EIR concerning jurisdiction of main proceedings, are the administrative authorities of a Member State entitled to attach funds held in a bank account of an economic operator following a declaration of insolvency made by another Member State?



2. Can an administrative authority of a Member state where secondary insolvency proceedings have *not* been opened refuse to recognise judgements made by the Member State of the main insolvency proceedings concerning the course and closure of the main proceedings?

Cooperation and/ or Coordination Issue

The cooperation issue revolved around the legitimacy of the attachment of MG Probud's assets by the German authorities, without a secondary proceeding being opened in that country, and an attempt to keep such an order separate from the insolvency proceedings.

The German courts also clearly had the view that it needed to protect the domestic assets in order to prevent them being gathered into the insolvency estate by the Polish courts, thereby protecting the domestic interests of local contracts and creditors. This is an example of an attempt to circumvent the obligation to cooperate by ceding jurisdiction fully to a main insolvency proceeding in favour of protecting domestic assets and interests.

Resolution

The CJEU, after having verified that the COMI of MG Probud was located in Poland and, therefore, it was correctly identified as main insolvency proceeding, recognized the applicability and enforceability of the judgments of the Polish insolvency procedure. In its decision, the CJEU cited the finding in *Eurofood*, noting that the rule of priority providing that main insolvency proceedings should be recognised in all Member States is based on the *principle of mutual trust* [para 27]. Further citing *Eurofood* para 40]:

'It is indeed that mutual trust which has enabled not only the establishment of a compulsory system of jurisdiction which all the courts within the purview of the Regulation are required to respect, but also as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favour of a simplified mechanism for the recognition and enforcement of judgements handed down in the context of insolvency proceedings...' [para 28]

It is further inherent in the principle of mutual trust that a court hearing an application for the opening of main insolvency proceedings should verify that it has COMI and that upon the establishment of that fact, all other Member State courts should recognise the judgment opening main proceedings [para 29 citing *Eurofood* paras 41 & 42]. COMI is not in dispute in the instant case, therefore the filing of main proceedings in Poland should carry with it all of the effects under EU Insolvency Regulation 1346/2000 and extend to cover all of MG Probud's assets, including those situated in Germany. Polish law was also deemed to govern the treatment of those assets situated in other Member States 'and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject' [para 43].

As Polish law is applicable and it does not permit enforcement proceedings, such as the German attachment order, to be brought after insolvency proceedings have been opened, the CJEU decided that the German authorities could not 'validly order, pursuant to German legislation, enforcement measures relating to MG Probud's assets situated in Germany' [para 44].

Applicability to Preventive Restructuring

Having precise and clear rules about the treatment of the debtor assets in another Member State, different from the one where a main proceeding has been opened, is fundamental in order to ensure the success of a restructuring procedure.

Without coordination and cooperation between different authorities, belonging to different Member States, any restructuring effort, involving two or more different countries, might be endangered.

In fact, missing such coordination with respects to the debtor assets, it would not be possible to foresee the resources available to restructure the business, since any authority involved (directly or indirectly) might seize, attach or make unavailable assets that might be already included in the restructuring plan proposed by the debtor.

Applicability of Existing Rules and Guidelines

EIR Recast:

Under the EIR Recast, the decision of the CJEU would have been the same.

Indeed, pursuant to art. 7(1) ('Applicable law') of Reg. 848/2015 'save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the "State of the opening of proceedings")'.

In addition, art. 7(2) provides that "the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

- (a) the debtors against which insolvency proceedings may be brought on account of their capacity;
- (b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
- (c) the respective powers of the debtor and the insolvency practitioner".

In view of the facts of the case and, specifically, of the absence of a secondary German insolvency proceeding, the German authorities should have recognized and enforced the decisions coming from the main proceeding, respecting the applicable law (i.e. Polish).

Guidelines and principles:

Pursuant to Principle 24(1) of the ALI-III Global Principles ('Control of Assets') 'if there is not a domestic insolvency case pending with respect to the debtor, then:

- (i) upon recognition, a representative of a foreign insolvency case should be given legal control, and assistance in obtaining practical control, of the debtor's assets, wherever they are located, to the same extent as a domestic insolvency administrator;
- (ii) upon recognition, a representative of a foreign insolvency case should be permitted to remove assets to another jurisdiction, where doing so is appropriate for the purposes of the insolvency case and if there is no undue prejudice to creditors'.

The above-mentioned principle highlights the need, in case a secondary domestic insolvency proceeding is not opened, to attribute to the main insolvency proceeding a global control over the debtor's assets, independently from their location.

