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Provisional text

JUDGMENT OF THE COURT (First Chamber)

9 November 2017 (\*)

(Reference for a preliminary ruling — Insolvency proceedings — Regulation (EC) No 1346/2000 — Court having jurisdiction — Action for unfair competition brought in the context of insolvency proceedings — Action brought by a company having its registered office in another Member State against the assignee of part of the business of a company subject to insolvency proceedings — Action not part of the proceedings or action deriving directly from those proceedings and closely connected with them)

In Case C-641/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 29 November 2016, received at the Court on 12 December 2016, in the proceedings

**Tünkers France,**

**Tünkers Maschinenbau GmbH**

v

**Expert France,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, C.G. Fernlund, J.-C. Bonichot, A. Arabadjiev and E. Regan, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Tünkers Maschinenbau GmbH and Tünkers France, by J.- J. Gatineau and C. Fattaccini, avocats,
- the French Government, by D. Colas and by E. de Moustier and E. Armoet, acting as Agents,
- the European Commission, by M. Heller and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

2 The request has been made in proceedings between Tünkers France ('TF') and Tünkers Maschinenbau GmbH ('TM') and Expert France concerning an action for unfair competition brought by Expert France against TM and TF.

## **Legal context**

### *Regulation No 1346/2000*

3 Recitals 4, 6 and 7 of Regulation No 1346/2000 state:

'(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

...

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions on Accession to this Convention.'

4 Article 3(1) of that regulation is worded as follows:

'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.'

### *Regulation (EC) No 44/2001*

5 Recitals 7 and 19 of Council Regulation (EC) No 44/2001 of 12 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) state:

‘(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

...

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol should remain applicable also to cases already pending when this Regulation enters into force.’

6 Article 1(1) and (2) of Regulation No 44/2001 provides as follows:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

7 Expert Maschinenbau GmbH, a company incorporated in Germany, carried on business manufacturing components for the automobile industry for which Expert France was granted exclusive distribution rights in France.

8 On 14 July 2006, the Amtsgericht Darmstadt (District Court, Darmstadt, Germany) opened insolvency proceedings against Expert Maschinenbau and appointed an insolvency administrator.

9 On 13 September 2006, the insolvency administrator concluded a provisional transfer agreement with TM providing for the takeover by the latter of part of Expert Maschinenbau’s business. On 22 September 2006, the insolvency administrator transferred that part of the business to Wetzel Fahrzeugbau GmbH, a company incorporated in Germany and the subsidiary of TM.

10 By letters of 19 September 2006 and 24 and 27 October 2006, TM invited the clients of Expert France, to which it represented itself as being the assignee of Expert Maschinenbau, to contact it from then on to make their orders.

11 Taking the view that that act constituted unfair competition, on 25 February 2013, Expert France sued TM and TF before the Tribunal de commerce de Paris (Paris Commercial Court, France) for acts of unfair competition.

12 TM and TF challenged the jurisdiction of that court on the basis of Article 3(1) of Regulation No 1346/2000, arguing that the dispute fell within the jurisdiction of the Amtsgericht Darmstadt (District Court, Darmstadt) as the court having opened the insolvency proceedings against Expert Maschinenbau.

13 The Tribunal de commerce de Paris (Commercial Court, Paris) rejected the plea of lack of jurisdiction by judgment of 8 November 2013, which was confirmed by a judgment of the Cour d'appel de Paris (Court of Appeal, Paris, France) of 19 July 2014. TM and TF brought an appeal in cassation before the referring court against that judgment. They argue that the court with jurisdiction to hear an action for damages for unfair competition, in so far as such an action derives directly from insolvency proceedings, is the court which opened those proceedings.

14 In that context, the referring court has doubts about the scope of the international jurisdiction of the court which opened the insolvency proceedings as laid down in Article 3(1) of Regulation No 1346/2000, and asks specifically whether an action for unfair competition brought by the subsidiary of an insolvent company may be regarded as being an action which derives directly from the insolvency proceedings and which is closely linked to them.

15 In those circumstances, the Cour de cassation (Court of Cassation, France) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 3 of [Regulation No 1346/2000] be interpreted as meaning that the court which opened insolvency proceedings has exclusive jurisdiction over an action seeking to establish liability by which the assignee of part of a business acquired in the course of those insolvency proceedings is accused of misrepresenting itself as the exclusive distributor of the goods manufactured by the debtor?’

### **Consideration of the question referred**

16 The answer to the question referred for a preliminary ruling requires the determination of the scope of the jurisdiction of the court which opened the insolvency proceedings within the meaning of Article 3(1) of Regulation No 1346/2000, since Article 1(2)(b) of Regulation No 44/2001, which applies in civil and commercial matters, excludes from its scope ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’.

17 In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36) (‘the Brussels Convention’), which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’ fall within the scope of Regulation No 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation

No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 21 and the case-law cited).

18 The Court also noted, as stated *inter alia* in recital 7 of Regulation No 44/2001, that the intention on the part of the EU legislature was to provide for a broad definition of the concept of ‘civil and commercial matters’ referred to in Article 1(1) of that regulation and, consequently, to provide that the article should be broad in its scope. By contrast, the scope of application of Regulation No 1346/2000, in accordance with recital 6 thereof, should not be broadly interpreted (judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 22).

19 Applying those principles, the Court has found that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation No 44/2001. Consequently, only those actions fall within the scope of Regulation No 1346/2000 (see judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 23).

20 It is that criterion that is set out in recital 6 of Regulation No 1346/2000 in order to define the subject matter of the latter. According to that recital, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which ‘are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings’.

21 In that context, it must be determined, in the light of the foregoing considerations, whether an action for damages for unfair competition, such as that in the main proceedings, satisfies that twofold test.

22 As regards the first criterion, it must be recalled that, in order to determine whether an action derives directly from insolvency proceedings, the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings (judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, EU:C:2014:2145, paragraph 27).

23 In the present case, it is clear from the findings of the referring court that the action in the main proceedings aims to establish the liability of TM and TF, the first of those companies being the assignee of a part of a business acquired in the course of insolvency proceedings, for allegedly committing acts of unfair competition detrimental to Expert France. In that action, Expert France does not challenge the validity of the assignment carried out in the course of the insolvency proceedings opened by the Amtsgericht Darmstadt (District Court, Darmstadt), but the fact that TM, which contacted Expert France’s clients and invited them to contact it directly in order to place their orders, attempted to take over its clientele, to the detriment of its interests.

24 It is true that, in the judgment of 2 July 2009, *SCT Industri* (C-111/08, EU:C:2009:419, paragraph 33), the Court held that an action challenging a transfer of shares in a company made in the course of insolvency proceedings fell within the scope of Regulation No 1346/2000.

25 However, unlike the case which gave rise to that judgment, in which the liquidator who transferred the shares was criticised for failing to use a power he derived specifically from the

provisions of national law governing collective procedures, the dispute in the main proceedings concerns the conduct of the assignee alone.

26 Furthermore, Expert France acted exclusively with a view to protecting its own interests and not to protect those of the creditors in the insolvency proceedings. Finally, that action is brought against TM and TF whose conduct is subject to other rules than those applicable in the context of insolvency proceedings. Therefore, the possible consequences of such an action cannot have any influence on the insolvency proceedings.

27 Therefore, it must be held that bringing an action for damages for unfair competition, such as that in the main proceedings, is a separate action and it is not based in the rules specific to insolvency proceedings.

28 As to the second criterion, mentioned in paragraph 20 of the present judgment, the Court has consistently held that it is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 is applicable (judgment of 2 July 2009, *SCT Industri*, C-111/08, EU:C:2009:419, paragraph 25).

29 It is true that, in the case in the main proceedings, the action for damages is directed against TM, the assignee of a part of the business in the context of insolvency proceedings. However, the acquired right, once it has become part of the assignee's assets, cannot retain a direct link with the debtor's insolvency in all cases.

30 In that context, even if the existence of a link between the action in the main proceedings and the insolvency proceedings against Expert Maschinenbau cannot be challenged, that link is neither sufficiently direct or sufficiently close so as to exclude Regulation No 44/2001 and therefore, so as to make Regulation No 1346/2000 applicable.

31 Having regard to the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 3(1) of Regulation No 1346/2000 must be interpreted as meaning that an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor does not fall within the jurisdiction of the court which opened the insolvency proceedings.

### **Costs**

32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor does not fall within the jurisdiction of the court which opened the insolvency proceedings.**

[Signatures]

\* Language of the case: French.

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