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The European Court of Justice Judgment in *Eurofood IFSC Limited (in Liquidation)*

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1. Introduction

The European Court of Justice (the 'ECJ') delivered its judgment[1] on the referral under Article 234 of the EC Treaty[2] in relation to the dispute between the Irish and Italian courts on the interpretation of the European Insolvency Regulation[3] (the 'Regulation') in the case of *Eurofood IFSC Limited (In Liquidation)* ('*Eurofood*') on 2 May 2006. In its judgment, the ECJ has endorsed the decision of Kelly J in the Irish High Court and Advocate General Jacobs' opinion.[4] The judgment confirms the Irish order winding up Eurofood and the appointment of Mr Pearse Farrell, Official Liquidator of Eurofood.

2. Background to the judgment

A chronology of the events leading to the judgment is set out below:

23 December 2003	the Italian parliament passed into law decree no. 347 providing for the extraordinary administration of companies with more than 1,000 employees and debts of no less than EUR 1 billion.
24 December 2003	Parmalat SpA ('Parmalat') was admitted to extraordinary administration proceedings by the Italian Ministry of Productive Activities. Dr Bondi was appointed as extraordinary administrator.
27 December 2003	the Civil and Criminal Court of Parma confirmed that Parmalat was insolvent and placed it in extraordinary administration.
27 January 2004	Bank of America, a creditor of Eurofood, presented a petition for the winding up of Eurofood and appointment of Mr Farrell as provisional liquidator. On that date, the Irish High Court appointed Mr Farrell as provisional liquidator of Eurofood with powers to take possession of all of its assets, to manage its affairs, to open a bank account in its name and to retain the services of its solicitors.
9 February 2004	the Italian Ministry of Productive Activities admitted Eurofood to the extraordinary administration of Parmalat.
10 February 2004	the Parma court made an order in which it acknowledged the filing of a petition to declare Eurofood insolvent and set the matter down for hearing for 17 February 2004.
13 February 2004	(Friday evening) the provisional liquidator received notification of the said hearing.
17 February 2004	the provisional liquidator filed a defence brief with the Parma court.
20 February 2004	the Parma court gave judgment which purported to open main insolvency proceedings concerning Eurofood, declaring it to be insolvent, determining that its centre of main interests (the 'COMI') was in Italy.
23 March 2004	the Irish High Court, in a judgment delivered by Kelly J, held that the presentation of a petition for the winding up of Eurofood and the appointment of Mr Farrell as provisional liquidator by the High Court on 27 January 2004, brought about the opening of main insolvency proceedings for the purposes of the Regulation.

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* Matheson Ormsby Prentice acts on behalf of Pearse Farrell, Official Liquidator of Eurofood.

1 Judgment of the ECJ dated 2 May 2006, case C-341/04.

2 Consolidated Version of the Treaty of the European Union (OJ C 325, 24.1.2002).

3 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L160/1 30.6.2000).

4 Opinion of Advocate General Jacobs on 27 September 2005, case C-341/04.

27 July 2004	the Irish Supreme Court decided to stay proceedings and refer five questions to the ECJ.
26 March 2004	the Official Liquidator lodged an appeal against the decision of the Parma court of 20 February 2004, and on 9 April 2004, the Official Liquidator lodged an appeal against the Ministerial decrees of 24 December 2003 and 9 February 2004.
27 September 2005	Advocate General Jacobs delivers his opinion broadly following the judgment of Kelly J in the Irish High Court. Advocate General Jacobs rejected the argument that the presumption that the COMI of a company was in the Member State of registration was rebutted by the mere fact that its parent company, registered in another Member State, was in a position to and did in fact control the policy of the subsidiary.
2 May 2006	the ECJ delivered its judgment which endorsed the decision of Kelly J in the Irish High Court and Advocate General Jacobs' opinion.

3. The questions

(a) The first question

Where a petition is presented to a court of competent jurisdiction in Ireland for winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening of insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2 of the Regulation?

(b) The second question

If the answer to question 1 is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of the Regulation by virtue of the Irish legal provision (Section 220(2) of the Companies Act, 1963) deeming the winding up of a company to commence at the date of the presentation of the petition?

(c) The third question

Does Article 3 of the Regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

(d) The fourth question

Where,

(i) the registered offices of a parent company and its subsidiary are in two different Member States,

(ii) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated, and

(iii) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary,

in determining the COMI, are the governing factors those referred to at (ii) above or on the other hand those referred to at (iii) above?

(e) The fifth question

Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation to persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound by virtue of Article 17 of the Regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?

4 The judgment

The ECJ did not answer the questions in the order in which the Irish Supreme Court referred them and was of the view that question 4, which concerned the factors relevant to identifying the COMI of a subsidiary company where it and its parent have registered offices in two different Member States, should be considered first. The Court then went on to consider question 3 before considering questions 1 and 5. The Court held that it was not necessary to answer question 2 in light of its reasoning in question 1.

We discuss below, the ECJ's responses in the order in which they were given.

The fourth question

The Court stressed in the judgment that the concept of COMI is peculiar to the Regulation and must therefore be interpreted in a uniform way, independently of national legislation[5] and referred to Recital 13 of the Regulation as support for the proposition that the COMI must be identified by reference to criteria that are both objective and ascertainable by third parties in order to ensure legal certainty and forseeability in relation to jurisdiction to open main insolvency proceedings.[6]

The ECJ held that where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the COMI of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that the COMI is located other than in the Member State of the registered office. The ECJ also stated that this could be the case in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. In contrast to this, the ECJ found that where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.[7]

The third question

The ECJ was of the view that, in this question, the Supreme Court essentially asked whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for.[8]

The ECJ acknowledged that the principle of mutual trust as set out in Recital 22 of the Regulation forms the basis for Article 16(1) which provides that insolvency proceedings opened in one Member State are required to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings. The principle of mutual trust requires, according to the ECJ, that the courts of other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to jurisdiction.[9]

The ECJ held that an interested party who believes that main insolvency proceedings should be opened in a Member State other than that in which the main insolvency proceedings were in fact opened, must use the national remedies available in the Member State of the court which opened main insolvency proceedings in order to challenge the opening of such proceedings.[10]

The first question

The ECJ answered this question in the affirmative. The ECJ opined that pursuant to Article 1(1) of the Regulation, insolvency proceedings[11] must have four characteristics in order for the Regulation to apply. They must:

(i) be collective proceedings;

(ii) be based on a debtor's insolvency;

(iii) entail at least partial or total divestment of that debtor; and

(iv) prompt the appointment of a liquidator.[12]

Insolvency proceedings to which the Regulation applies are listed in Annex A to the Regulation and the list of liquidators is set out in Annex C to the Regulation. In Ireland's case 'provisional liquidator' is included in Annex C of the Regulation and is therefore included in the

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5 Paragraph 31 of the judgment.
6 Paragraph 33 of the judgment.
7 Paragraph 37 of the judgment.
8 Paragraph 38 of the judgment.
9 Article 42 of the judgment.
10 Article 43 of the judgment.
11 The Regulation expressly applies to 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator' (Article 1 of the Regulation).
12 Paragraph 46 of the judgment.

definition of liquidator in Article 2 (b) of the Regulation. A provisional liquidator can only be appointed in Ireland as part of compulsory winding up proceedings, which is included in relation to Ireland in Annex A as an insolvency proceeding.

The ECJ noted that by requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 is recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first.[13]

The ECJ pointed out that the Regulation does not define sufficiently precisely what is meant by a 'decision to open insolvency proceedings',[14] and noted that the conditions and formalities required for opening insolvency proceedings are a matter for national law, and that they differ considerably from one Member State to another.[15]

Referring to the European Commission's arguments and noting that it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle be capable of being applied as soon as possible in the course of the proceedings, to avoid claims of concurrent jurisdiction over an extended period,[16] the ECJ opined that a 'decision to open insolvency proceedings' for the purposes of the Regulation must be regarded as including not only a decision which is formally described such by the legislation of the Member State of the court which handed it down, but also any decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. The ECJ also pointed out that such divestment entailed the debtor losing the powers of management which it has over its assets.

The ECJ rejected Dr Bondi's and other parties' arguments that the appointment of a provisional liquidator constituted the appointment of a 'temporary administrator' within the meaning of that term in Article 38 of the Regulation and held that Article 38 was required to be read together with Article 29. A liquidator in the main proceedings is entitled, pursuant to Article 38, to request the opening of secondary proceedings in another Member State, and the power to appoint a temporary administrator, according to the ECJ, was intended to assist a liquidator in these circumstances. The ECJ distinguished this from the circumstances of the *Eurofood* case.

In conclusion, the ECJ held that where there is an application for the commencement of main insolvency proceedings (such as in this case, compulsory liquidation) and that decision involves the company divesting itself of its assets and the appointment of a liquidator (including for the purposes of Ireland, as was the case here, a provisional liquidator) this constitutes the opening of main insolvency proceedings.

The second question

The ECJ did not answer this question in light of its answer to question 1.

The fifth question

This question concerns the issue of public policy. Article 26 of the Regulation entitles a Member State to refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be 'manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual'. The ECJ held that the case law of the ECJ concerning the Brussels Convention can be applied to the interpretation of Article 26 of the Regulation.[17] The ECJ opined that the right to be notified of procedural documents, and the right to be heard, referred to in the fifth question, occupy an eminent position in the organisation and conduct of a fair legal process. The Court further noted that in the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance and that any restriction on the exercise of the right to be heard must be duly justified.

The ECJ therefore concluded that the answer to the fifth question must be that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard (which the Irish High Court and Supreme Court found was the case here by virtue of the fact that neither Eurofood's creditors nor the

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13 Paragraph 49 of the judgment.
14 Paragraph 50 of the judgment.
15 Paragraph 51 of the judgment.
16 Paragraph 52 of the judgment.
17 Paragraph 64 of the judgment.
18 Paragraph 67 of the judgment.

provisional liquidator were given the papers in advance of the oral hearing to confirm Dr Bondi's appointment as extraordinary administrator).[18]

5. Conclusion

Perhaps the key question from the perspective of the interested parties was whether the presentation of a petition combined with the appointment of a provisional liquidator constituted the opening of main insolvency proceedings in Ireland. The significance of the ECJ's response to this question is confined to Ireland (and following a recent amendment of domestic law, the UK).[19] What then in terms of the wider commercial community throughout the EU may be gleaned from the judgment? The ECJ has confirmed, unsurprisingly, that a *first past the post* rule applies. Because of the factual background, and therefore the questions posed by the Irish Supreme Court, many issues in relation to COMI remain to be resolved, perhaps by future ECJ decisions. It is quite clear, however, that the previously widely held view that one must look separately at each company within a group still stands. In addition, the mere fact that a parent exercises actual control over the policy of a subsidiary is not sufficient to displace the presumption in favour of a company's COMI being located in the Member State of its registered office. The ECJ's recognition that the public policy exception may be availed of where there has been a fundamental breach of a party's right to a fair hearing may also turn out to be a significant development in the evolution of the jurisprudence of the ECJ in relation to the Regulation, but it is possibly too early to say.

Following the ECJ judgment, the matter came back before the Irish Supreme Court on 19 June 2006. Having heard oral submissions in relation to the Judgment from the principal interested parties, the Supreme Court has reserved its decision in relation to Dr Bondi's appeal.

Notes

19 Council Regulation (EC) No. 694/2006 of 27 April 2006 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No. 1346/2000 on insolvency proceedings (OJ L 121/1 6.5.2006).