

Eurofoods referred to ECJ

Introduction

Hot off the press! On 27 July the Supreme Court of Ireland gave judgment in respect of Eurofoods IFSC Limited and the application of the European Council Regulation on insolvency proceedings (the "Regulation").

In perhaps the most articulate judgment so far dealing with the Regulation, the Supreme Court of Ireland refuses to recognise main proceedings commenced in Parma on the grounds that they are contrary to public policy, and confirms that the appointment of provisional liquidators constitutes a main proceeding for the purpose of the Regulation.

The case is also the first significant reference to the European Courts of Justice (ECJ) under the Regulation and hopes are hinged upon the ECJ providing some clarity in respect of the Regulation.

The decision in the Supreme Court of Ireland underlines the potential conflicts which may arise as local courts exercise their jurisdiction under the Regulation. The case highlights one of the most vexed issues in the context of the Regulation of how a court is to determine the centre of main interests ("COMI") of a debtor. There is no definition of COMI within the Regulation itself, save for a reference in paragraph 13 of the Preamble to the Regulation which states that it should correspond to the place where a debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties; and in Article 3 (1) which sets out the rebuttable presumption of the COMI being the place of the registered office of the debtor.

In this Client Briefing we give a short overview of the case. Further analysis of the Regulation and how it has been interpreted in practice by courts across Europe will follow in a separate note.

Chronology of events

Date	Event
23 December 2003	Parmalat group files for extraordinary administration in Italy
27 January 2004	Winding up petition presented against Eurofoods (Irish subsidiary) and a provisional liquidator is appointed in Ireland
9 February 2004	Dr Bondi appointed as extraordinary administrator of Eurofoods in Italy
10 February 2004	Dr Bondi initiates change of Eurofoods's Irish directors to Italian directors
13 February 2004	Notice of Parma Court hearing to declare insolvency of Eurofoods in Italy
16 February 2004	Provisional liquidator requests winding up petition hearing to be brought forward. Refused, but provisional liquidator given authority by Irish Court to attend Italian proceedings
17 February 2004	Hearing in Parma to open insolvency
20 February 2004	Parma Court declares Eurofoods's COMI in Italy
23 March 2004	Irish Court refuses to recognise Parma Court order, makes winding up order effective as at 27 January
27 July 2004	Supreme Court upholds High Court decision on appeal, but refers certain questions for determination by the European Courts of Justice

Key Issues

- **Appointment of provisional liquidator constitutes main proceedings**
- **Irish Supreme Court refuses to recognise Parma Court judgment**
- **Parma Court proceedings contrary to public policy**
- **Irish judges criticise Parmalat extraordinary administrator**
- **Irish Court requests European Courts of Justice to consider application of insolvency regulation to be dealt with on super priority basis**

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Overview

The case relates to a subsidiary of the Parmalat Group, Eurofoods IFSC Limited ("Eurofoods"), a company incorporated in Dublin. The conflict arose when notwithstanding the presentation of a winding up petition and appointment of a provisional liquidator in respect of Eurofoods in Dublin, the Parma Court in Italy proceeded to open extraordinary administration proceedings and determined that the company's COMI was in Italy. The Dublin Court reasserted its jurisdiction by formally winding up the company on 23 March 2004 with effect from 27 January 2004, when the winding up petition was first presented. The Irish Supreme Court upheld the decision of the lower court on appeal.

The issue

The central issue in the case was whether the presentation of a winding up petition and the appointment of a provisional liquidator in Dublin constituted the opening of main proceedings for the purposes of the Regulation.

Irish High Court decision

It was held that the order appointing the provisional liquidator became effective on 27 January 2004 and constituted the opening of main proceedings under the Regulation. Under Irish law, the date of the presentation of the petition becomes the effective date for the winding up proceedings even though the order is made some time after, in this case 23 March 2004.

It was also held that there was no requirement under Irish law or practice to expressly declare that the COMI was in Ireland in the order appointing the provisional liquidator (though this is the practice in England and Wales). It was a matter of fact as to whether the COMI was in Ireland. The factors taken into account by the High Court for the purposes of establishing that the COMI was in Ireland were as follows:

- Creditors' understanding and perception of Eurofoods's COMI in Ireland
- Eurofoods was subject to fiscal and regulatory provisions in Ireland
- Day to day administration of Eurofoods conducted by Bank of America on behalf of Eurofoods in Ireland in accordance with agreement governed by Irish law
- Eurofoods's accounts were maintained in Ireland
- Board meetings held in Ireland.

In addition to the factors set out above, which evidentially established to the satisfaction of the Irish High Court that the COMI was in Ireland (in particular, the need for third parties to ascertain the COMI), the judge was clearly influenced by the following factors:

- conduct of Dr Bondi (e.g. attempts to change the COMI by replacing Irish directors with Italian directors, and not providing notice or adequate documentation to the provisional liquidator for the hearing in Parma); and
- to recognise the Parma proceedings would be contrary to public policy as they deprived the provisional liquidator of proper notice and a fair procedure.

After taking all these matters into account an order was made for the winding up of Eurofoods to take effect from 27 January 2004 as the main proceedings under the Regulation. It also confirmed that the creditors of Eurofoods would not be required to participate in the restructuring plan proposed by Dr Bondi pursuant to the Italian proceedings.

Supreme Court decisions

Dr Bondi appealed the High Court's decision and on 27 July, two appeal

judgments were handed down by the Supreme Court of Ireland. The first, was limited to considering whether to uphold the High Court decision; and the second focused on the questions to be referred to the ECJ.

Criticism of Dr Bondi and refusal to recognise Parma proceedings

The first appeal judgment was limited to considering whether the High Court judgment, which refused to recognise the decision made in the Parma Court, should be upheld. The Supreme Court was critical of the conduct of Dr Bondi who even at the appeal hearing failed to offer any explanation for his failure to provide the provisional liquidator with a copy of the petition for the application or any other papers grounding his application to the Parma Court.

Overriding public policy

The Supreme Court found that it would be manifestly contrary to public policy, as a matter of Irish law, to give recognition to the decision of the Parma Court on the grounds that the provisional liquidator had not been given the protection of fundamental aspects of fair procedure.

Reference to the ECJ

The second judgment focused on the questions to be referred to the ECJ which the Supreme Court requested be dealt with on a special priority basis. Since there was essentially a disagreement between Member States as to where the COMI was located, and two main proceedings in respect of the same entity, it was for the ECJ to resolve the matter.

The questions which are being referred to the ECJ are set out in the table below:

1.	Where a petition is presented to a court of competent jurisdiction in Ireland for the 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 powers to act, does that order combined with the presentation of the petition constitute a judgment opening insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346 of 2000?
2.	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 that Regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?
3.	Does Article 3 of the said 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 situate 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?
4.	Where, (a) the registered offices of a parent company and its subsidiary are in two different member states, (b) 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 and in the member state where its registered office is situated and (c) 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 "centre of main interests", are the governing factors those referred to at b) above or on the other hand those referred to at c) above?
5.	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 said 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?

Comment

Perhaps of most interest are the Supreme Court comments on the factors raised by Dr Bondi to rebut the presumption that the COMI is other than the place of incorporation. These are contained in the second judgment. Dr Bondi relied upon the following:

- the company was a wholly owned subsidiary of Parmalat
- the sole object of the company was the provision of finance for companies in the Parmalat group
- the company's policy was decided at Parmalat's headquarters in Italy, by Parmalat executives and the company had no independent decision making function

- the company had no employees
- the liability of the company to the noteholders was guaranteed by Parmalat.

The Supreme Court noted that it was perfectly normal and to be expected that subsidiary companies in a group will pursue and give effect to group policy. Further that parent companies form subsidiaries for a variety of business, commercial, and tax reasons, but that it was essential for the Court to respect corporate identity and the rules of law relating to companies and the separate existence of such companies could not be ignored.

Conclusion

The timing of the hearing and the constitution of the judges at the ECJ are not yet known. Hopes are hinged upon the ECJ providing some general guidance as to the necessary factors to take into account when exercising jurisdiction and asserting COMI. ■