

# THE *EUROFOOD* DECISION OF THE EUROPEAN COURT OF JUSTICE\*

by

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## 1 Introduction

The European Court of Justice (ECJ) issued its *Eurofood* ruling on May 2, 2006.<sup>1</sup> This ruling resulted from the referral by the Supreme Court of Ireland<sup>2</sup> of five questions of EU law, based on the EU Insolvency Regulation (EU Regulation),<sup>3</sup> preliminary to the Irish Supreme Court deciding a pending appeal on the Dublin High Court's decision to open a main insolvency proceeding<sup>4</sup> for Eurofood IFSC Ltd in competition with a parallel main insolvency case for the same entity in Parma, Italy.<sup>5</sup> The two parallel main proceedings arose because each court decided that Eurofood's center of main interests (CoMI) was located in its own country.

Eurofood was registered in Ireland in 1997 as a company "limited by shares," with its registered office in Dublin, Ireland. It is a wholly owned subsidiary of

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<sup>1</sup> Case 341/04, Eurofood IFSC Ltd, 2006 E.C.R. \_\_\_\_\_. (*Eurofood-ECJ*).

<sup>2</sup> *In re Eurofood IFSC Ltd.*, [2004] IESC 45 (Ir.).

<sup>3</sup> Council Regulation 1346/2000, 29 May 2000, on insolvency proceedings, 2000 O.J. (L160) 1-18 (as amended).

<sup>4</sup> According to the language used in the English version of the EU Regulation, a "proceeding" corresponds to a "case" under U.S. bankruptcy law. See, e.g., 11 U.S.C. §§ 301-03 (providing for the filing of a "case" under the bankruptcy statute).

<sup>5</sup> See *In re Eurofood IFSC Ltd.*, Parma Civil & Criminal Ct., Feb. 19, 2004 (unpublished opinion on file with author), *aff'd*, Trib. Amm. Reg. 10 June 2004, n. 6998/2004 (on file with author).

Parmalat SpA, an Italian corporate group doing business in some thirty countries throughout the world. Eurofood served principally to obtain financing for Parmalat's Venezuelan and Brazilian subsidiaries under the favorable tax treatment for businesses located in the Dublin port. At the beginning of 2004, Eurofood's assets consisted of the receivables on two large loans which it had obtained and passed on to Parmalat entities in Venezuela and Brazil, and loan guarantees from Parmalat SpA. The funds had been spent in South America, and Parmalat SpA was in deep financial trouble.

Parmalat SpA was admitted into extraordinary administration proceedings in Italy on December 24, 2003 by the Italian Minister of Productive Activities, and a few days thereafter in court in Parma, Italy. Bank of America filed an involuntary winding up case against Eurofood on January 27, 2004 in the Dublin High Court and obtained the appointment of a temporary liquidator.

On February 20, 2004, the Parma court opened a main insolvency proceeding for Eurofood. The Parma court found that Eurofood's center of main interests was located in Italy, because its management and center of control came from its Parmalat parent that was located there. The Irish liquidator took an appeal, and the Italian appellate court affirmed.

On March 23, 2004, the Dublin High Court found that Eurofood's center of main interests was located in Ireland, because its registered office was located there and it appeared to the third party creditors that its center of main interests was located in Ireland. The court further found that its opening of an Irish main proceeding dated as of January 27, when it had appointed the temporary

liquidator. The Italian administrator appealed this decision to the Irish Supreme Court, which referred to the ECJ five preliminary questions under the EU Regulation.

## **2 Issues Submitted to the European Court of Justice**

The Irish Supreme Court submitted five questions to the ECJ for its authoritative determination, so that the Irish court could make a fully informed ruling on the issues raised before it on appeal, are the following:

- (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 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 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 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?

- (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 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?

### **3 European Court of Justice Decision**

The ECJ answered four of the five questions posed by the Irish Supreme Court, and found that the fifth was moot.

#### **3.1 Factors in Determining Location of the CoMI**

Taking the questions referred by the Irish Supreme Court out of order, the ECJ first addressed the fourth question, on whether the CoMI should be

determined based on the location of its operations as seen by third parties, or based on the location of a company's control persons. In determining the CoMI, the ECJ ruled:

[W]here 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 [Council] Regulation [(EC) No 1346/2000 of 29 May 2000 on insolvency proceedings], whereby the centre of main interests 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 an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so 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. By contrast, 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 that Regulation.<sup>6</sup>

In determining the proper location of the CoMI of a subsidiary, according to the ECJ, it is necessary to examine two sets of factors.<sup>7</sup> The first set of factors is the location where a debtor regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated. The second set of factors arises from the location of the parent company which, by virtue of its ownership and power to appoint directors, is able to control the policy decisions of the subsidiary. Where (as in the Eurofood proceedings), these factors point to different countries for the location of the CoMI, the court must determine the relative weight to give to each factor.<sup>8</sup>

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<sup>6</sup> *Eurofood-ECJ* ¶ 37.

<sup>7</sup> *See id.* ¶ 27.

<sup>8</sup> *See id.*

The EU needs a uniform rule for interpreting and applying the jurisdictional test of the debtor's CoMI, in the ECJ's view.<sup>9</sup> There is no room for divergent national views on this issue. In part, the ECJ based this determination on the fact that this concept is peculiar to the EU Regulation, and is otherwise unknown in the law of the EU member countries.<sup>10</sup>

The determination of the location of a debtor's CoMI, the ECJ stated, must be based on criteria that are both objective and ascertainable by third parties.<sup>11</sup> If EU countries do not follow a uniform interpretation, the CoMI concept cannot serve its function of determining in which country a main insolvency case belongs and which country's law will govern the insolvency proceeding.<sup>12</sup> Inconsistent interpretations of the CoMI concept can lead to dueling jurisdiction between countries for the main proceeding of a debtor, as in fact happened in the Eurofood case.

The ECJ turned to the thirteenth recital of the EU Regulation to define the scope of the concept of CoMI.<sup>13</sup> This recital states, "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of [its] interests on a regular basis and is therefore ascertainable by third parties."<sup>14</sup>

The ECJ treated this recital as a "definition," which "shows that the centre of main

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<sup>9</sup> See *id.* ¶ 31.

<sup>10</sup> See *id.* In fact, this assertion slightly overstates the facts. The concept of CoMI is not known in the domestic law of EU member countries. However, two countries have adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law), which uses the CoMI concept in the same way as in the EU Regulation. The United Kingdom (excepting Northern Ireland) adopted the law only in the spring of 2006, some two months before the ECJ issued its decision. In contrast, Poland adopted its version of the Model Law effective October 1, 2003, and it was already in place when Poland became an EU member effective May 1, 2004.

<sup>11</sup> See *id.* ¶ 33.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* ¶ 32.

<sup>14</sup> EU Reg., comt. 13.

interests must be identified by reference to criteria that are both objective and ascertainable by third parties.”<sup>15</sup>

The ECJ found that both the objectivity and the ascertainability by third parties were necessary to an important goal of the EU Regulation: “to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings.”<sup>16</sup> Objectivity and foreseeability are particularly important, the ECJ found, given that the determination of the court with jurisdiction to open a main proceeding also determines which country’s law will govern the proceeding.<sup>17</sup>

These third parties are typically the debtor’s major creditors. As in the Eurofood proceeding, third parties may have undertaken considerable effort in exercising due diligence to assure themselves as to the location of the debtor’s CoMI. In case of an insolvency proceeding, they would have an interest in reasonably predicting in advance where the insolvency proceeding would properly be filed, what country’s substantive law and procedural rules would govern the proceeding, and whether it might become entangled in a far larger proceeding of the corporate group of which the particular debtor is a part.

The weight that the ECJ gave to the thirteenth recital, as an integral substantive provision of the Regulation, is remarkable. The recitals now appearing at the beginning of the EU Regulation were not included in the draft

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<sup>15</sup> *Id.* ¶ 33.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

treaty that was converted into the regulation.<sup>18</sup> They were added presumably by the EU staff, perhaps with help from the countries sponsoring the regulation.<sup>19</sup>

Normally, as a matter of construction, a recital would be treated as explanatory commentary, and not the source of a substantive rule of law, let alone a rule of such importance as the definition of CoMI. On the other hand, the recitals were adopted by the European Union equally with the text of the Regulation, and thus can be given official weight.

### **3.1.1 Presumption that CoMI is Located in Country of Registered Office**

After examining the interests of third parties, principally consisting in the creditors of a debtor filing an insolvency proceeding, the ECJ turned to a consideration of the possible rebuttal of the presumption that the CoMI is located in the country where the registered office is located.<sup>20</sup> Because Eurofood's registered office was located in Dublin, the Article 3(1) presumption unquestionably placed its CoMI in Ireland.<sup>21</sup>

### **3.1.2 Rebuttal of Presumption**

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<sup>18</sup> See European Union Convention on Insolvency Proceedings, published in 23 BROOK. J. INT'L L. 75 (1997). The draft treaty had only four brief introductory paragraphs, which were replaced with four different introductory paragraphs in the Regulation that precede the present thirty-three recitals at the beginning of the Regulation.

<sup>19</sup> According to the introductory paragraphs, it was principally Germany and Finland whose efforts led to the conversion of the draft treaty into a regulation after it failed to obtain the necessary signatures for adoption as a treaty.

<sup>20</sup> See *Eurofood-ECJ* ¶¶ 34-37.

<sup>21</sup> See EU Reg. Art. 3(1), which provides in relevant part, "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."

Under U.S. law, there are a variety of ways of treating a presumption and its possible rebuttal. First, a presumption may be treated as a “bursting bubble” that disappears as soon as evidence is introduced that is sufficient to support a contrary inference.<sup>22</sup> Second, a presumption may shift the burden of going forward in presenting evidence at trial, but not shift the ultimate burden of proof.<sup>23</sup> Third, while not shifting the burden of proof, a presumption may be taken into account in weighing the evidence.<sup>24</sup> Fourth, a presumption may shift the burden of proof to the party against whom the presumption operates.<sup>25</sup> Fifth, a presumption may be rebuttable only by clear and convincing evidence.<sup>26</sup> Sixth, the rebuttal of some presumptions may not be permitted at all.<sup>27</sup>

The existing authority interpreting the EU Regulation in domestic courts adopts the third alternative, that the presumption that a corporate debtor’s CoMI

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<sup>22</sup> This is known as the Thayer-Wigmore theory of a presumption. See, e.g., 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122.1, at 428 (2005) (citing \_\_\_\_\_ WIGMORE, EVIDENCE § 2491 (3d ed. 1940); \_\_\_\_\_ THAYER, PRELIMINARY TREATISE ON EVIDENCE 336 (1898)); CAL. EVID. CODE § 604 (2006) (“The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.”).

<sup>23</sup> This is the position taken by the Federal Rules of Evidence. See FED. R. EVID. 301 (“a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.”).

<sup>24</sup> See, e.g., WRIGHT & GRAHAM, *supra* note 22, § 5722.1, at 435-38 (designating this effect of a presumption as the “California Heresy”).

<sup>25</sup> See, e.g., CAL. EVID. CODE § 606 (West 2006) (“The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden off proof as to the nonexistence of the presumed fact.”).

<sup>26</sup> See, e.g., 11 U.S.C. § 362(c)(3)(C) (requiring clear and convincing evidence to rebut the presumption that a bankruptcy case filed by an individual is not in good faith, if the individual had a prior case that was dismissed within a year before the filing).

<sup>27</sup> See, e.g., *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.*, 809 F. Supp. 1383, 1389 (N.D. Cal. 1992) (under California law, a substantial relationship between work that an attorney has performed for a former client and its work for a current client in opposition to the former client creates an irrebuttable presumption that the attorney has received confidential information from the former client that creates a conflict of interest disqualifying the lawyer from the work for the current client).

is located at its place of registration carries some evidentiary weight, and is a factor that the court may consider, along with the evidence presented, in determining the location of the debtor's CoMI.<sup>28</sup>

### 3.1.3 ECJ Decision on Rebuttal Requirements

The issue is joined under the EU Regulation, and in the Eurofood proceeding, on whether the presumption can be rebutted by evidence of the location of the parent company and that the parent controls the policy decisions of the subsidiary.<sup>29</sup> I should note parenthetically that apparently the evidence presented on this subject to the Dublin High Court varied enormously from that presented in the Parma court.

In its decision, the ECJ gave a clear answer the proper evidence to consider in an attempted rebuttal of the presumption that a debtor's CoMI coincides with its registered office. Rebuttal must be based, the ECJ found, on factors that are both objective and discernible by third parties.<sup>30</sup> For example, the ECJ stated, such rebuttal could be successful for a "letter-box" company that is not carrying on any business in the country where its registered office is located.<sup>31</sup> In contrast, the ECJ stated, if a company carries out its business in the territory of an EU member country where its registered office is located, the location of its

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<sup>28</sup> See *In re ci4net.com Inc.*, High Court, Ch. Div. (Companies Court), May 20, 2004; [2004] EWHC 1941 (Eng.); Michaël Raimon, Centres des Intérêts Principaux et Coordination des Procédures dans la Jurisprudence Européen sur le Règlement Relatif aux Procédures d'Insolvabilité, 3 J. DROIT INT'L (CLUNET) 739, 750 (2005).

<sup>29</sup> See *Eurofood-ECJ* ¶ 27.

<sup>30</sup> *Id.* ¶ 34.

<sup>31</sup> See *id.* ¶ 35.

CoMI cannot be rebutted by evidence that its economic choices are or can be controlled by a parent company in another EU country.<sup>32</sup>

While the ECJ opinion does not draw out the consequences of its decision on the Eurofood controversy,<sup>33</sup> the implications are clear. The presumption that Eurofood's CoMI was located in Ireland, because its registered office was located there, was supported by the evidence of the expectations of its major creditors. Given this evidence, the location of its parent corporation Parmalat SpA in Italy was insufficient to rebut the presumption.

Thus the decision of the Dublin High Court, that Eurofood's CoMI was located in Ireland, was correct. In contrast, the Italian courts improperly decided that Eurofood's CoMI was in Italy, based on the fact that its important economic decisions were made by the Parmalat corporate decision makers in Italy.

### **3.2 Jurisdiction to Open Main Proceedings in a Non-CoMI Country**

After explaining the proper factors for determining the CoMI, the ECJ next took up the third issue included in the Irish Supreme Court's reference. Suppose, the Irish Supreme Court hypothesizes, that (a) the debtor's registered office is located in country X, and (b) that the debtor conducts the administration of its interests on a regular basis, in a manner ascertainable to third parties, in

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<sup>32</sup> See *id.* ¶¶ 36, 37.

<sup>33</sup> One function of the distinctive nature of the reference of preliminary questions to the ECJ is that its jurisdiction is limited to answering the questions presented. The national (or lower) court referring the question then applies the answer to the case in front of it, and the decision carries the weight of the domestic court rather than the ECJ. See generally J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403, 2421 (1991).

country X or Y.<sup>34</sup> Does a court in country Z have jurisdiction to open a main proceeding for the debtor, in light of Articles 3 and 16 of the EU Regulation.<sup>35</sup> The point of this question is whether Articles 3 and 16 mandate the recognition in countries X and Y of decision of a court in country Z to open a main proceeding, or whether a court in X or Y may review the decision rendered in country Z, especially on jurisdiction grounds.<sup>36</sup> The ECJ found:

[O]n a proper interpretation of the first subparagraph of Article 16(1) of the Regulation [No. 1346/2000], the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.<sup>37</sup>

Mutual trust, the ECJ said, is the principle governing the recognition of the opening of a main proceeding in another EU country and the priority granted by Article 16 to the first court decision opening a case.<sup>38</sup> By corollary to this principle of mutual trust, the ECJ stated, the EU countries have waived “the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings . . . .”<sup>39</sup> Thus, once a decision opening a main proceeding is made, the principle of mutual trust requires courts in other EU countries to recognize that decision, and prevents them from reviewing the assessment that the first court made as to its

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<sup>34</sup> The hypothesis posed by the Irish Supreme Court specifies only that both the registered office and the location where the debtor administers its interests on a regular basis is not country C.

<sup>35</sup> See *Eurofood-ECJ* ¶ 24 (citing EU Reg. comt. 22).

<sup>36</sup> See *id.* ¶ 38. The same issue could arise in country D (another EU member), which has no claim to hosting the debtor’s CoMI, but where a party in interest may wish judicial assistance in connection with the debtor’s insolvency proceeding.

<sup>37</sup> *Id.* ¶ 44.

<sup>38</sup> See *id.* ¶ 39.

<sup>39</sup> See *id.* ¶ 40.

jurisdiction.<sup>40</sup> The proper avenue to challenge such a determination, the ECJ stated, is to invoke<sup>41</sup> the remedies available under the law of the country where the opening decision was made (i.e., to take an appeal in its courts).

Again the ECJ did not draw the conclusion for the Eurofood case. However, the clear import of this decision is that the Irish courts were required to recognize and give effect to the opening of the Eurofood proceeding in Italy, if it was first in time (and certain procedural requirements were met).

There are two procedural qualifications that the ECJ recognized for this application of the principle of trust. First, the court in country Z must examine whether the debtor's CoMI is located in that country.<sup>42</sup> Second, "such an examination must . . . comply with the essential procedural guarantees required for a fair legal process . . . ."<sup>43</sup> The ECJ expanded on these issues later in its opinion.<sup>44</sup>

### **3.3 Consequence of Appointing a Provisional Liquidator**

The ECJ next turned to the first inquiry posed by the Irish Supreme Court, whether the Dublin court's appointment of a provisional liquidator constituted a decision opening an insolvency proceeding for Eurofood, within the meaning of Article 16(1). The clear import of this question was to inquire whether the January 27, 2004 decision of the Dublin High Court appointing a provisional liquidator took priority, pursuant to Article 16(1), over the February 9, 2004

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<sup>40</sup> See *id.* ¶ 42.

<sup>41</sup> See *id.* ¶ 43.

<sup>42</sup> See *id.* ¶ 43.

<sup>43</sup> *Id.*

<sup>44</sup> See discussion at notes 67-80 *infra*.

decision of the Italian Minister for Production Activities admitting Eurofood to extraordinary administration.

A ruling in Ireland's favor on this point would give the Dublin proceeding jurisdictional priority over the Parma proceeding, even assuming that everything was done properly in connection with the Parma proceeding. The ECJ ruling on this issue was as follows:

[O]n a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.<sup>45</sup>

Thus, for the application of the EU Regulation, Article 1(1)<sup>46</sup> requires that a national insolvency proceeding have four characteristics: (1) it must be a collective proceeding, (2) it must be based on the debtor's insolvency, (3) it must result in at least a partial divestment of the debtor, and (4) it must involve the appointment of a liquidator.<sup>47</sup> Whether a statute qualifies under this provision is not left to judicial decision: Annex A to the Regulation specifies the statutes for each EU country (except Denmark, where the EU Regulation is not applicable)

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<sup>45</sup> *Id.* ¶ 58.

<sup>46</sup> See EU Reg. Art. (1)(1), which provides: "This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."

<sup>47</sup> See *Eurofood-ECJ* ¶ 46.

that meet this qualification, and Annex C lists the titles of the liquidators in each country who meet the definition in Article 2(b).<sup>48</sup>

The ECJ recognized that priority, for recognition purposes under Article 16(1), is based on which decision on opening a main proceeding is handed down first.<sup>49</sup> However, the Regulation does not define with sufficient precision what constitutes a “decision to open insolvency proceedings.”<sup>50</sup>

The ECJ noted that the conditions and formalities for opening an insolvency proceeding are determined by domestic national law, and not the EU Regulation, and they vary considerably from one EU country to another.<sup>51</sup> In some countries the proceedings are opened very soon after the submission of the application, while in other countries it may take a substantial period of time before a decision to open a case is made.<sup>52</sup> The ECJ also noted that a “provisional” opening may be in place for several months.<sup>53</sup> In contrast, the ECJ declared that, in order to assure the effectiveness of the recognition provisions of the EU Regulation, it is necessary that recognition be applied as soon as possible in the course of the proceedings.<sup>54</sup>

The principle that only one main proceeding is permitted would suffer serious disruption, the ECJ noted, if competing courts could claim concurrent jurisdiction

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<sup>48</sup> EU Reg. Art. 2(b) defines a liquidator as, “any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C.” This list must be updated by the EU to reflect changes in national insolvency laws in EU countries.

<sup>49</sup> See *Eurofood-ECJ* ¶ 49.

<sup>50</sup> See *id.* ¶ 50.

<sup>51</sup> See *id.* ¶ 51.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* ¶ 52.

for a main proceeding over an extended period.<sup>55</sup> Thus, the interpretation of the phrase “opening of insolvency proceedings” must be interpreted in light of the objective of assuring the effectiveness of the Regulation.<sup>56</sup>

For example, the urgency of recognition is highlighted in the context of the application of the moratorium or automatic stay resulting from the filing of an insolvency case in an EU country. Article 16(1) exports the home country moratorium (i.e., that of the country where the case is filed) in a main proceeding to all other EU countries. A court in another country needs to know immediately if a proceeding either pending when the first main insolvency case is filed or commenced thereafter is subject to the home country moratorium. Similarly, such a court needs to know whether assets that may be involved in its own case are *in custodia legis* in the home country court.

As I have pointed out in an earlier writing,<sup>57</sup> Irish law lacks a step in the commencement of an insolvency proceeding that is designated as a “decision to open” such a proceeding. Furthermore, under Irish law, the precise point where an insolvency proceeding is opened, for the purposes of the EU Regulation, apparently varies from case to case. The ECJ decided to bypass this formal gap and to focus on the substance of what constitutes a decision to open an insolvency proceeding.

A decision to open an insolvency proceeding under the law of an EU country, the ECJ held, includes any decision under a statutory scheme referred to in

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<sup>55</sup> See *id.*

<sup>56</sup> See *id.* ¶ 53.

<sup>57</sup> See Hon. Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. (forthcoming May 2006)

Annex A that meets the formal criteria of Article 1(1) and appoints a liquidator of the kind specified in Annex C.<sup>58</sup> It does not matter, the ECJ held, that the liquidator is initially appointed on an interim basis.<sup>59</sup>

The Italian administrator and the Italian government acknowledged that the temporary liquidator appointed by the Dublin High Court on January 27, 2004 was an Annex C administrator. Nonetheless, they argued that Article 38 granted powers to such an administrator to apply for preservative measures “for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.”<sup>60</sup> Thus, they argued, the appointment of such an administrator could not open the insolvency proceeding.<sup>61</sup>

The ECJ rejected this construction. It found instead that this provision applied to a temporary administrator in an insolvency case that was not yet open because the home court had not yet ordered that the debtor be divested of its property or the temporary administrator is not an Annex C administrator.<sup>62</sup> The purpose of Article 38, the ECJ found, was to permit this type of administrator, though not authorized to request the opening of a secondary proceeding in another country,<sup>63</sup> to apply for preservative measures in that country pending

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<sup>58</sup> See *Eurofood-ECJ* ¶¶ 54, 58.

<sup>59</sup> See *id.* ¶ 55.

<sup>60</sup> EU Reg. Art. 38.

<sup>61</sup> See *Eurofood-ECJ* ¶ 56.

<sup>62</sup> See *id.* ¶ 57.

<sup>63</sup> See EU Reg. Art. 29.

receipt of full authority.<sup>64</sup> Thus, this provision did not assist the Italian assertion of jurisdiction over a main case for Eurofood.<sup>65</sup>

The clear import of this interpretation, again not drawn out in detail by the ECJ, is that the January 27 decision of the Dublin High Court to appoint a provisional administrator constituted the opening of a main insolvency case for Eurofood that was entitled to recognition from that date forward by the courts in Italy. The decision by the court in Parma to open a main proceeding for Eurofood on February 19 thus violated the EU Regulation.

In light of this conclusion, the ECJ found it unnecessary to address the Irish Supreme Court's second question (which was premised on a contrary finding on the first question).<sup>66</sup>

### **3.4 Impact of Procedural Irregularities on Recognition Obligation**

In its fifth question, the Irish Supreme Court asked the ECJ to determine whether it was required to recognize an insolvency proceeding opened in another EU country where the procedure leading to the decision disregarded procedural rules guaranteed by the public policy of the country where the court is located. This question invoked the public policy exception to the requirements of the EU Regulation.<sup>67</sup> The ECJ ruled:

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<sup>64</sup> See *Eurofood-ECJ* ¶ 57.

<sup>65</sup> The ECJ did not in fact make this final finding. It confined its decision to the abstract issues presented by the Irish Supreme Court, and left it to the national courts to draw the appropriate conclusions about the Eurofood case.

<sup>66</sup> See *Eurofood-ECJ* ¶ 59.

<sup>67</sup> EU Reg. Art. 26 provides:

Any Member State may refuse to recognize insolvency proceedings opened in another member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be

[O]n a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognize 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 a person concerned by such proceedings enjoys.<sup>68</sup>

In responding to this inquiry, the ECJ addressed both the public policy exception to the EU Regulation and the importance of considerations of fair legal process.

### 3.4.1 Public Policy

The ECJ pointed out that, in the context of the Brussels Convention on the Enforcement of Judgments, it has held that recourse to that document's public policy exception is reserved for exceptional cases.<sup>69</sup> This exception may be invoked, it had held in that case,

only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as fundamental within that legal order.<sup>70</sup>

This same case law, the ECJ found, applies to the EU Regulation.<sup>71</sup>

Thus, as a general principle, the public policy exception to the recognition of the opening of an insolvency proceeding in another EU country or the enforcement of any judgment therein should be invoked only in extraordinary situations. However, the ECJ did not rule on whether the Irish Supreme Court

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manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

<sup>68</sup> *Eurofood-ECJ* ¶ 67.

<sup>69</sup> See *id.* ¶ 62 (citing Case C-7/98 *Krombach* [2000] ECR I-1935, ¶¶ 19, 21).

<sup>70</sup> See *id.* ¶ 63 (citing *Krombach* ¶¶ 23, 37).

<sup>71</sup> See *id.* ¶ 64.

could properly invoke the public policy provision to deny recognition of the opening of the Italian main insolvency proceeding for Eurofood, because this conclusion was beyond the scope of the questions submitted.

### 3.4.2 Fair Legal Process

Nonetheless, the ECJ noted, prior ECJ jurisprudence recognizes that everyone is entitled to fair legal process.<sup>72</sup> This principle is inspired, according to the ECJ, by the fundamental rights forming an integral part of the general principles of EC law and the constitutional traditions common to the EU countries.<sup>73</sup> In addition, it derives from the guidelines of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>74</sup> The principle is also very similar to the “procedural due process” principle in U.S. law.

The right to be notified of procedural documents and the right to be heard “occupy ‘an eminent position’ in the organization and conduct of a fair legal process,” the ECJ stated.<sup>75</sup> In addition, the ECJ found that, in the context of insolvency proceedings, the right of creditors and their representatives to participate in accordance with the “equality of arms” principle<sup>76</sup> is particularly important.<sup>77</sup>

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<sup>72</sup> See *id.* ¶ 65 (citing Case C-185/95 P *Baustahlgewebe v. Comm’n*, [1998] ECR I-8417, ¶¶ 20, 21; Joined Cases C-174/98 P and C-189/98 P *Netherlands v. Comm’n*, [2000] ECR I-1, ¶ 17; *Krombach*, ¶ 226).

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> *Id.* ¶ 66.

<sup>76</sup> “Equality of arms” is a concept that is unknown in U.S. law. However, it is generally known in the international legal community, and applies particularly in criminal prosecutions. Generally, it means that, “each party [must be] afforded a reasonable opportunity to present his or her case

Any restriction on exercise of the right to be heard, the ECJ stated, “must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.”<sup>78</sup> A court in an EU country may refuse to recognize insolvency proceedings opened in another EU country where the decision to open the proceedings was taken in “flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.”<sup>79</sup>

The ECJ recognized that the application of these principles to the Eurofood case may be problematic. The ECJ cautioned the Irish Supreme Court not to insist that a fair legal process requires an oral hearing,<sup>80</sup> and stated that the court “must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator . . . was given sufficient opportunity to be heard” in the Parma court.

On the issue of fair procedure, the impact of the ECJ decision is not clear. The Irish Supreme Court and the Dublin High Court were both very seriously concerned with the procedures followed by the court in Parma. It is difficult to predict whether, “having regard to the whole of the circumstances,” the Irish

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under conditions that do not place him at an appreciable disadvantage vis-à-vis his opponent.” *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70, at 2 (May 6, 2002).

<sup>77</sup> See *Eurofood-ECJ* ¶ 66.

<sup>78</sup> See *id.*

<sup>79</sup> *Id.* ¶ 67.

<sup>80</sup> It is uncertain why the ECJ included this particular caution in its decision. The decision of the Irish Supreme court is in two parts, one part referring five questions for preliminary ruling to the ECJ and a second relating to the recognition of the Parma court. There is nothing in either of these decisions giving undue importance to the hearing and oral argument in Parma, as opposed to the entire procedure leading to its decision to open a main proceeding for Eurofood. See *In re Eurofood IFSC Ltd.*, [2004] IESC 47 (Ir.).

Supreme Court will decide that the procedures in the Parma court were fundamentally unfair, and to deny recognition of the decision there to open a main case for Eurofood. Given the ECJ's determination that the appointment of the temporary liquidator on January 27 constituted an opening of a main case for Eurofood, the Irish Supreme Court may well find it unnecessary to reach this issue.

### **3.5 Corporate Groups**

Eurofood, and especially the Italian court decisions on its CoMI, directly raise the issue of how to deal with the CoMI of corporate groups. A corporate group can normally deal with the financial difficulties of a particular member of the group (unless it is the principal operating entity) in the ordinary course of business. Thus, it is unusual for a single member of a corporate group to file an insolvency proceeding.

However, if the entire group encounters financial difficulty, as happened for the Parmalat group, a group-wide solution to the financial problems is often required. In consequence, many of the group members will typically have to file insolvency proceedings.

If the insolvency proceedings of the group members are dispersed in a number of different countries, a group-wide solution to the financial problems is much more difficult to negotiate. If the proceedings are all filed in one court, on the other hand, there will be one judge to administer the cases and one set of lawyers and other professionals.

Most important, the insolvency proceedings will all be governed by one legal regime (except where conflict of laws rules lead to the application of another country's law) and one set of legal procedures. In contrast, if proceedings are filed in a variety of countries, as happened in Parmalat, there are a variety of judges and a variety of groups of lawyers and other professionals. Most important, there are also different applicable legal regimes and different sets of legal procedures.

The ECJ decision in Eurofood gives no assistance in dealing with this problem. The ECJ stated, "each debtor constituting a distinct legal entity is subject to its own court jurisdiction."<sup>81</sup> In consequence, the CoMI of each legal entity must be determined separately from the CoMI of any related entity in the corporate group. This separate determination determines the proper national venue for the main proceeding for that particular entity.

The ECJ thus reiterated the problem of venue for corporate groups, but gave no help in solving it. However, it is not appropriate to fault the ECJ for failing to grapple with this problem or find a solution to it. The problem lies in the drafting of the EU Regulation. A similar problem inheres in the Model Law. A legislative solution is required for the problem: we should not expect the courts, even the ECJ, to fix the legislative problem.

Fortunately, it appears that UNCITRAL will adopt a project to attack this problem in the near future. Given the UNCITRAL initiative, the EU may well await the results of the UNCITRAL deliberations, and then adopt a similar (if not identical) solution to this problem. Like the CoMI concept itself, the corporate

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<sup>81</sup> *Eurofood-ECJ* ¶ 30.

group solution to the problem of varying CoMIs should be uniform in both the Model Law and the EU Regulation.