ARTICLE

Advocate General's Decision in *Eurofood*

Tony O'Grady and Niamh Counihan, Matheson Ormsby Prentice, Solicitors, Dublin, Ireland

Introduction

Advocate General Jacobs delivered his opinion[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') on 27 September 2005. In responding to four out of the five questions referred to the European Court of Justice (the 'ECJ') in the affirmative, the Advocate General has endorsed the decision of Kelly J in the Irish High Court[4] and the strong recommendations of the Irish Supreme Court, in its judgment dated 27 July 2004,[5] on foot of which these questions were referred to the ECJ. Central to Advocate General Jacobs' opinion is his conclusion that the presentation of a petition to the High Court combined with the appointment of a provisional liquidator constituted a judgment opening main insolvency proceedings under the Regulation. Perhaps more interestingly from the perspective of the broader insolvency community, Advocate General Jacobs rejected the argument that the presumption that the centre of main interests (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 control the policy of the subsidiary.

Chronology of events

In order to put the Advocate General's opinion in context it may be useful to set out a number of key dates central to the dispute.

- On 23 December 2003, the Italian parliament passed into law decree no. 347 providing for the extraordinary administration of companies with more than 1000 employees and debts of no less than EUR 1 billion.
- On 24 December 2003, Parmalat SpA ('Parmalat') was admitted to extraordinary administration proceedings by the Ministry of Productive Activities. Dr Bondi was appointed as extraordinary administration.
- On 27 December 2003, the Civil and Criminal Court of Parma (the 'Parma Court') confirmed that Parmalat was insolvent and placed it in extraordinary administration.
- On 27 January 2004, Bank of America, a creditor of Eurofood, presented a petition for the winding up of Eurofood and appointment of Mr Pearse 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.
- On 9 February 2004, the Italian Ministry of Productive Activities admitted Eurofood to the extraordinary administration of Parmalat.
- On 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.
- On the evening of Friday 13 February 2004, the provisional liquidator received notification of the said hearing.
- The provisional liquidator filed a defence brief with the Parma Court on 17 February 2004.
- On 20 February 2004, the Parma Court gave judgment which purported to open main insolvency proceedings concerning Eurofood, declar-

Notes

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

2 Consolidated Version of the Treaty of the European Union (O.J. C 325, 24 .1.2002).

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

4 Eurofood IFSC Ltd, Re [2004] B.C.C. 383.

5 Eurofood IFSC Ltd, Re [2005] 1 ILRM 161.

ing it to be insolvent, determining that its COMI was in Italy.

- On 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
- On 27 July 2004, the Irish Supreme Court decided to stay proceedings and refer five questions to the ECJ.
- On 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.

Questions Referred to the ECJ

(1) 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 of a judgment opening of insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2 of the Regulation?

(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 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?

(3) 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 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 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 COMI, 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 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?

The Opinion

The first question

Advocate General Jacobs believes that the first question calls for an affirmative answer in view of the fact that the approach follows from the 'object and purpose, the scheme and wording of the Regulation.'[6]

Notes

6 Paragraph 51 of the opinion.

He is of the view that a decision of an Irish court appointing a provisional liquidator, in the context of a compulsory winding up by the Irish High Court, must be 'a judgment opening insolvency proceedings'[7] within the meaning of Article 16 of the Regulation.[8]

The Advocate General's reasoning in concluding as he does is as follows. Article 2(a) of the Regulation defines 'insolvency proceedings' as meaning the collective proceedings referred to in Article 1(1) which are listed in Annex A. Collective insolvency proceedings 'entail the partial or total divestment of a debtor and the appointment of a liquidator.'[9] In Ireland's case 'provisional liquidator' is included in Annex C of the Regulation and is therefore included in the definition of liquidator in Article 2 (b). 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. Article 16 of the Regulation requires that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction is to be recognized in all other Member States from the time that it becomes effective in the State where it was delivered.

A number of parties, including Dr Bondi, argued that a provisional liquidator was simply a 'temporary administrator' within the meaning of that term in Article 38 of the Regulation. This is rejected by Advocate General Jacobs, who notes that the order appointing Mr Farrell as provisional liquidator gave him extensive powers, that the order had the effect of depriving the directors of Eurofood of the power to act and that his role as provisional liquidator was therefore much wider than the role of the temporary administrator envisaged in Article 38.[10]

Advocate General Jacobs stresses that Recital 11 of the Regulation specifically refers to the fact that the Regulation does not seek to harmonize national law as regards insolvency proceedings. He does not accept Dr Bondi's argument that, until the winding-up order was made, there was no finding of insolvency and notes that, as the first question assumes that the petition presented was 'for the winding-up of an insolvent company', it is not appropriate for the ECJ to question the underlying premise. He is of the opinion that the more 'natural' construction of the definition of 'judgment' in Article 2(e) is one which included 'the decision of any court empowered to ... appoint a liquidator.'[11]

The Advocate General argues that whilst Article 1(1) contains a definition of the insolvency proceedings which fall within the scope of the Regulation, that provision cannot be construed in isolation from the definitions in Article 2.[12] He refers to the consensus amongst commentators that once proceedings have been included in Annex A, the Regulation applies without any further review by the courts of other Member States. Since compulsory winding-up by the court in Ireland is included in Annex A, Advocate General Jacobs does not consider that the application of the Regulation to such proceedings may be put in doubt on the ground that certain aspects of the definition of Article 1(1) are not satisfied.[13]

The second question

This question was only required to be answered if the response to the first question was in the negative. Whilst Advocate General Jacobs answers the first question in the affirmative, he deals with question two briefly and confirms that the question should be answered in the affirmative. He notes that, pursuant to Article 16(1), national law determines when the judgment opening insolvency proceedings becomes effective. Advocate General Jacobs highlights the fact that the Regulation was not intended to be a harmonization measure and rejects Dr Bondi's arguments that the Regulation in some way *'overrides'* domestic law provisions[14].

He refers to Section 220(2) of the Companies Act, 1963 and notes that the terms of that provision, which are applicable by virtue of the Regulation, seem conclusively to resolve the national court's second question.[15]

Notes

7 Article 2(f) of the Regulation defines 'the time of the opening of proceedings' as 'the time at which the judgment opening proceedings becomes effective whether it is final judgment or not.' Article 16(1) of the Regulation provides that national law determines when the judgment opening insolvency proceedings becomes effective.

8 Paragraph 60 of the opinion.

9 Article 1(1) of the Regulation.

10 Paragraph 71 of the opinion.

11 Paragraph 65 of the opinion

12 Paragraph 83 of the opinion.

13 Paragraph 84 of the opinion.

14 Paragraph 92 of the opinion.

15 Paragraph 94 of the opinion.

The third question

The Supreme Court essentially asked in its third question whether a court in one Member State, notwithstanding the decision of a court in another Member State (being the Member State of the company's registered office and in which the company conducted its interests in a manner ascertainable by third parties) to open insolvency proceedings, had jurisdiction to open main insolvency proceedings.

Advocate General Jacobs concludes that where insolvency proceedings are first opened by a court in a Member State in which a company's registered office is situated and in which the company conducts the administration of its business on a regular basis in a manner ascertainable by third parties, the courts of other Member States do not have jurisdiction to open main insolvency proceedings. In his view the remedy for any party to insolvency proceedings concerned that the court opening the main proceedings had wrongly assumed jurisdiction under Article 3 of the Regulation should be sought in the domestic legal system of the Member State where the court was situated, with the possibility of a reference to the ECJ if appropriate.[16]

The fourth question

This question concerns the factors which determine where the COMI of a company is situate.

The opinion emphasizes that the Regulation does not apply to groups of companies but rather to individual companies and that it does not seek to regulate the relationship of parent and subsidiary. Each subsidiary within a group must be considered individually under the Regulation.[17] A parent company's control is not, according to the Advocate General, sufficient to rebut the presumption in Article 3(1) of the Regulation that the COMI of a subsidiary company is situated in the Member State where its registered office is to be found.[18] Advocate General Jacobs notes that 'strong evidence of overwhelming, overriding and ascertainable control by a parent company would be required to support a finding that the centre of a subsidiary company's main interests is situated at a place other than that which would follow from the explicit terms of Recital 13.'[19] Recital 13 states that the COMI 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

Advocate General Jacobs believes 'it is particularly important, ... [that] in cross-border debt transactions ... that the relevant jurisdiction for determining the rights and remedies of creditors is clear to investors at the time they make their investment.'[20] He refers to the fact that insolvency is a 'foreseeable risk' and that 'it is important that international jurisdiction ... be based on a place known to the debtor's potential creditors, thus enabling the legal risks which would have to be assumed in the case of an insolvency to be calculated.'[21]

The Advocate General opines that the question of ascertainability 'involves looking to see where head office functions are actually carried out' and that this is an objective test.[22] Where the registered offices of a parent company and its subsidiary are in two different Member States, the fact that 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 will normally be decisive in determining the subsidiary company's COMI.[23] If however, the Advocate General reasons, it could be shown that the debtor's parent company actually controlled the policies of its subsidiary company, and that this situation is transparent and ascertainable (and not therefore merely retrospectively), the standard test could be displaced.[24]

He therefore concludes that, where a debtor is a subsidiary company and where its registered office and that of its parent company are in two different Member States and 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 in which its registered office is situated, the presumption that the COMI of the subsidiary is in the Member State of its registered office is

Notes

16 Paragraph 104 of the opinion.
17 Paragraph 117 of the opinion.
18 Paragraph 110 of the opinion.
19 Paragraph 123 of the opinion.
20 Paragraph 118 of the opinion.
21 Paragraph 122 of the opinion.
22 Paragraph 115 of the opinion
23 Paragraph 116 of the opinion.
24 Paragraph 124 of the opinion.

not rebutted merely because 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.

The fifth question

Advocate General Jacobs notes at the outset that if his analysis of question one is correct, then this question does not arise, since the Italian proceedings were opened after the Irish proceedings and therefore do not in any event require recognition as main proceedings under the Regulation.[25] This question concerns the issue of public policy. Under Article 26 of the Regulation, a Member State may refuse to recognize 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 public policy exemption is, the Advocate General points out, intended to be of limited scope.[26]

The opinion notes also the fact that given the wording of the question 'it is not open to the parties, or indeed to [the ECJ], to depart from the factual assumptions which are woven into the terms in which the question is put.'[27] The Irish courts held that the failure of Dr Bondi to put Eurofood's creditors on notice of the hearing before the Parma Court (despite that court's direction on the matter) and the failure to furnish the Official Liquidator with the petition or other papers grounding the application until after the hearing had taken place, amounted to a lack of due process such as to warrant the Irish courts' refusal to give recognition to the decision of the Parma Court under Article 26 of the Regulation. Advocate General Jacobs also comments that the 'conclusion was reached after a thorough and searching review of the conduct of the Parma Court by the Supreme Court of Ireland.'[28]

In his analysis, Advocate General Jacobs considers the ECJ decision of *Krombach*[29] which concerns the refusal to recognize a judgment pursuant to Article 27 (1) of the Brussels Convention[30] and agrees with Dr Bondi that the case suggests that the court 'can and should review the limits of what can properly fall within the public policy exception in order for the fundamental goals of recognition and cooperation not to be frustrated.'[31] Advocate General Jacobs refers to the Virgós–Schmit Report[32] and its interpretations of public policy also. He considers that 'the requirement of due process in principle falls within the scope of the public policy exception under Article 26' of the Regulation.[33] The Advocate General stresses that the requirement of due process is of particular importance given that the Regulation does not permit review of the substance of a decision of which recognition is sought.[34]

Advocate General Jacobs rejects the argument that, on the basis that Article 26 applies only where the 'effects' of the proposed recognition would be 'manifestly contrary' to the State's public policy, this question should be answered in the negative.

As regards the discretion of the Irish court to decline to recognize a judgment on grounds of breach of public policy.[35] Advocate General Jacobs opines that 'on the basis of the hypothesis on which the question was put, which is in turn based on findings of fact made by the referring court, there is noting to suggest that [the Supreme Court] incorrectly exercised its discretion by refusing recognition.'[36]

The Advocate General concludes that where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to

Notes

25 Paragraph 129 of the opinion.

26 Paragraph 131 of the opinion.

27 Paragraph 133 of the opinion.

28 Paragraph 139 of the opinion.

29 Case C-7/98 [2000] ECR 1-1935.

30 The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the 'Convention') (O.J. C 27 of 26.01.1998). The Convention has been superseded by Brussels I – Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (O.J. L 12/1 of 16.1.2001) and Brussels II – Council Regulation (EC) No. 2201/2003 of 23 November 2003 (O.J. L 338, 23.12.2003).

31 Paragraph 136 of the opinion.

32 The Virgós–Schmit Report is a document of the Council of the EU of 8 July 1996-6500/1/96 but was not published in the Official Journal. The Virgós–Schmit Report is included in *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2002),* by G. Moss, I Fletcher and S Isaacs.

33 Paragraph 142 of the opinion.

34 Paragraph 144 of the opinion.

35 This is in contrast with Article 27 of the Convention which provides that the Member State 'shall' refuse recognition.

36 Paragraph 151 of the opinion.

have legal effect in relation to persons or bodies whose rights to fair procedures and a fair hearing have not been respected in reaching such a decision, that Member State is not bound by Article 16 of the Insolvency 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 circumstances where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles.[37]

Conclusion

The general consensus amongst the parties directly involved in the case seems to be that the decision of the ECJ will be delivered before the end of 2005, but no precise date has as yet been set.

Notes

37 Paragraph 152(c) of the opinion.