

Eurofood Case: Clarification on location of COMI

On 2nd May the European Court of Justice handed down its long awaited judgment giving answers to the questions referred to it by the Irish Supreme Court in the case of Eurofood IFSC Ltd (case C-341/04). The judgment followed the reasoning found in the Opinion of Advocate General Jacobs delivered on 27th September 2005. Together these give important guidance on how the EC Regulation 1346/2000 on insolvency proceedings (EUIR) should be interpreted when considering where a company's centre of main interest (COMI) is situate for the purposes of opening insolvency proceedings to which the EUIR applies. Determining where the COMI of a company is may be of significance to finance parties because it determines where main insolvency proceedings (those having universal application) as opposed to secondary proceedings (those applying only to assets within a particular State) can be opened.

Background

Eurofood, a wholly owned subsidiary of Parmalat, was incorporated in Ireland where it had its registered office. Eurofood had no offices in Italy. Eurofood's principal activity was the provision of financing facilities for other companies within the Parmalat group. Parmalat guaranteed many of the liabilities that it incurred. Eurofood had two Italian executive directors and two Irish non-executive directors, and all but one of its board meetings took place in Dublin. On 27 January 2004 one of Eurofood's creditors presented a petition to the High Court of Ireland for the winding up of Eurofood and applied for the appointment of a provisional liquidator, whom the Court appointed on the same day.

On 9 February 2004 the Italian Ministry of Productive Activities admitted Eurofood, as a group company, to the extraordinary administration of Parmalat (proceedings in relation to Parmalat itself had opened on 24 December 2003). On 20 February 2004 the Parma court gave a judgment purporting to open main insolvency proceedings in relation to Eurofood. The Parma court made a determination, despite the proceedings in train in Ireland that Eurofood's COMI was in Italy, and appointed an extraordinary administrator over its assets.

Irish Proceedings

The Irish liquidator had only been given notice of the Italian proceedings shortly before the hearing in Parma. He had not received a copy of the Italian administrator's petition despite an order of the Italian court to that effect.

On 23 March 2004 the Irish court, refusing to recognise the Italian insolvency proceedings, held that Eurofood's COMI was located in Ireland, and that the appointment of the Irish provisional liquidator on 27 January 2004 had opened main insolvency proceedings for the purpose of the EUIR. A winding-up order was granted. Under Irish law the date on which the winding up of Eurofood commenced was deemed to be the date the petition was presented – 27th January 2004. The Italian administrator appealed to the Irish Supreme Court, which stayed proceedings and referred a number of questions to the European Court of Justice for a ruling.

Key Issues

Ability of a parent company to influence decision making does not rebut presumption that COMI is at place of registered office

Provisional liquidation constitutes the opening of insolvency proceedings

Decisions reached in error can only be corrected in the same State's courts

Refusal to recognise a decision of another State on public policy grounds should be applied sparingly

No guidance on whether presentation of the petition dictates the date of opening of proceedings in all cases

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Why is the COMI important?

The place where a company has its COMI determines the State where main insolvency proceedings under the EUIR can be commenced. The insolvency official appointed under such main proceeding has authority to deal with all of the company's assets. The appointment is thus of universal application. Other insolvency proceedings in relation to the company are by definition secondary and only apply to the assets in the jurisdiction in which such secondary proceedings are commenced. Lenders who wish to assess the impact insolvency may have on a transaction need to know where the COMI of the obligor is situated to help them determine which insolvency law is likely to apply to that transaction. The law of the main proceedings governs a number of factors (these are set out in Article 4 of the EUIR) including, for example, the ranking of claims in the insolvency and the rules relating to voidness, voidability and unenforceability of transactions entered into by the company.

European Court Decision

The Irish Supreme Court referred five questions to the European Court. As is the case on all such references by national courts the questions were couched in the abstract and so the answers given by the European Court are of wide application. It will now be for the Irish court to apply the answers in the context of the facts of the Eurofood case.

Identifying the COMI

There is a presumption contained in Article 3(1) that a company's COMI is situated in the State where it has its registered office. The Court thought that this presumption could be rebutted only if there were factors that were ascertainable by those dealing with the company that objectively established that its administration was conducted elsewhere. The Court gave as an example the relatively straightforward case where a company has a registered office in one State but that office is no more than a letterbox address and the company does not carry on any activity in that State. In such a case the fact that there was no trading activity and/or administration conducted in that State would be a factor readily discoverable by those dealing with the company potentially leading to the rebuttal of the presumption in Article 3(1). The Court believed the presumption as to the situation of the COMI in the State where the registered office is located is not rebutted simply by producing evidence that the headquarters of the parent company that has the ability to make or influence economic choices for its subsidiary was elsewhere. Apart from the example described above what would be sufficient to rebut the presumption that the location of the registered office determines the COMI was not stated by the European Court in any detail. What, however, seems clear from the decision is that the burden of proof placed on those seeking to rebut the presumption that the location of the registered office determines the COMI is a high one. Indeed, it appears to us that previous cases considered by the English courts on this issue such as *Re Enron Directo* (2002) and *In Daisytek-ISA Limited* (2003) would possibly now be decided differently.

Primacy of the first decision

The European Court said it was essential to the integrity of the system created by the EUIR that a court checks that it has jurisdiction under Article 3 (that the COMI is within its territory) before opening main proceedings but if it does so the principle of mutual trust requires that the courts in other Member States recognise and accept the prior decision. This means that if a State (First State) wrongly concludes that a company's COMI is within its boundaries and opens main insolvency proceedings in relation to that company its decision must be recognised in the courts of another State (Second State) even if the courts of the Second State consider the original decision of the First State to be in error. The correct procedure in such cases is for the aggrieved party to seek a reversal of the original decision in the higher courts of the First State.

Provisional liquidation opens proceedings

The Court considered that the appointment of a provisional liquidator by the Irish court upon the presentation of the winding up petition did constitute the opening of insolvency proceedings for the purposes of Article 16(1) of the EUIR. Annexes A and C to the EUIR specifically recognised for Ireland provisional liquidation and a provisional liquidator. Secondly, the appointment of a provisional liquidator was a step in a collective insolvency process and divested the management of the rights to conduct the business of the company. Consequently, the criteria for the opening of insolvency proceedings were fulfilled.

This leaves the issue of whether the date of the presentation of a winding up petition on which a winding up order is subsequently made would be the point at which insolvency proceedings were opened for the purposes of the EUIR in cases where no provisional liquidator is appointed. It is a shame that the Court did not take this opportunity to clarify the doubt, which exists in this respect as in most cases there will not be any provisional liquidator appointed. Conflicts may still occur in relation to the recognition of other insolvency proceedings commenced in another State in between presentation of a petition and the making of an order. There can be a considerable time delay between presentation of the petition and the making of a winding up order. Given the importance seemingly placed on the divestment of management as part of the insolvency process, there must be some doubt that the presentation of a winding up petition, without more, will be sufficient in this context.

Public policy

Another issue considered by the European Court raised some delicate issues as to the scope of the public policy exception contained in Article 26 of the EUIR to the general rule that one State must recognise earlier decisions of other States. Article 26 permits a court to refuse to recognise such decisions where 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 Court thought that only where recognition would constitute a manifest breach of the rule of law regarded as essential in the legal order of the State in which recognition of the earlier decision is being considered would there be a basis to refuse recognition within Article 26. Bearing in mind that a fair legal process is fundamental the Court thought that the Irish court would be justified in refusing recognition of the Italian proceedings where there had been a flagrant breach of the fundamental right of the liquidator in the Irish proceedings to be heard in the Italian proceedings.

Conclusion

Guidance on how to assess where a COMI is situated has been long awaited by borrowers, lenders and their advisors. It now seems clear from the decision of the European Court in this case that establishing that the COMI of a company is not in the State of its registered office will be difficult. That a higher burden of proof has been imposed is to be welcomed.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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