

## FINANCIAL RESTRUCTURING ALERT

### THE IMPLICATIONS OF THE *EUROFOOD* JUDGMENT OF MARCH 23, 2004



On March 23, 2004, Mr. Justice Peter Kelly of Ireland's High Court (the High Court) delivered an important judgment in the matter of the Irish company Eurofood IFSC Limited (Eurofood), a wholly owned subsidiary of the Italian company Parmalat S.p.A. (Parmalat). In its interesting and well-reasoned 33-page judgment, the High Court comprehensively describes the structure under the Council regulation (EC) No. 1346/2000 on insolvency proceedings (the EU Insolvency Regulation) and how the concept of "centre of main interests" (COMI) under the EU Insolvency Regulation should be interpreted.

Summarized below are some of the most important aspects of the *Eurofood* judgment.

#### BACKGROUND

On January 27, 2004, a petition was presented to Ireland's High Court for the winding up of Eurofood and the appointment of a provisional liquidator. On that same day, Pearse Farrell was appointed as the provisional liquidator of Eurofood.

On January 30, 2004, the provisional liquidator informed Enrico Bondi, the special commissioner in the Italian extraordinary administration proceeding of Parmalat, of his appointment as provisional liquidator of Eurofood.

On February 9, 2004, the Italian Ministry for Productive Activities admitted Eurofood to an Italian extraordinary administration proceeding similar to that of Parmalat, and Mr. Bondi was appointed special commissioner in that proceeding.

On February 20, 2004, the civil and criminal court of Parma (the Parma court) declared Eurofood insolvent and found that Eurofood's COMI was in Italy.

## **THE QUESTION FOR THE HIGH COURT**

Did the presentation of an Irish petition for the winding up of Eurofood and the appointment of an Irish provisional liquidator by the High Court on January 27, 2004, bring about the opening of main proceedings under Article 3 of the EU Insolvency Regulation?

## **CONCLUSIONS OF THE HIGH COURT**

The High Court concluded that the winding up of Eurofood and the appointment of a provisional liquidator by the High Court on January 27, 2004, brought about the opening of main proceedings under Article 3 of the EU Insolvency Regulation and that the COMI of Eurofood was and is within the state of Ireland.

In addition, the High Court found that the creditors of Eurofood are not required to participate in a procedure under Italian law that manifestly is not a winding up but a form of reorganization.

## **CONFLICT OF JURISDICTION**

In its judgment, the High Court explicitly states that it is anxious to avoid a conflict of jurisdiction. However, it also notes that its first obligation is to give effect to the EU Insolvency Regulation and to apply the principles and tests prescribed by it.

The High Court makes it clear that the unfortunate conflict of jurisdiction between the High Court and the Parma court resulted from Mr. Bondi's decision to move the Italian court to make the order it did in circumstances where such an application was inappropriate.

## **WHY THE PARMA COURT ORDER IS NOT BINDING ON THE HIGH COURT**

The High Court lists five primary reasons to support its conclusion that it cannot be bound by the Parma court order —

- there is a presumption under the EU Insolvency Regulation that the COMI of Eurofood lies in Ireland
- the objective evidence submitted to the High Court establishes that fact
- in appointing the provisional liquidator of Eurofood, the High Court must have based its conclusion on the evidence placed before it
- the order of the High Court antedated that of the Parma court
- pursuant to Article 16 of the EU Insolvency Regulation, the Parma court was obliged to recognize the appointment of the provisional liquidator by the High Court.

The High Court also states that, to the extent necessary, a further reason why it should not give recognition to the decision of the Parma court is based on Article 26 of the EU Insolvency Regulation, which permits any member state to refuse to recognize insolvency proceedings opened in another state or to enforce a judgment handed down

in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to the state's public policy and, in particular, its fundamental principles or the constitutional rights and liberties of the individual.

According to the High Court, the proceedings before the Parma court violated the Eurofood creditors' right to a fair hearing because the Eurofood creditors were not heard on the application before the Parma court, despite the directive from the Parma court that all interested parties be heard.

The High Court found that there was a further lack of due process before the Parma court because the provisional liquidator of Eurofood (i) was notified after close of business on Friday, February 13, 2004, that there would be a hearing in Parma at midday on Tuesday, February 17, 2004, and (ii) was not furnished with the petition or other papers grounding the application until after the conclusion of the hearing before the Parma court.

## COMI<sup>1</sup>

In addressing the COMI of Eurofood, the High Court emphasized the need for third parties to ascertain the COMI of a debtor. The High Court further acknowledged that the most important third parties in an insolvency are the creditors.

The High Court found that the clear perception of the Eurofood creditors was that they were dealing with investments issued by a company that was located in Ireland and was subject to Irish fiscal and regulatory provisions. There is no evidence whatsoever that the creditors considered that the company was run from Italy. The Eurofood creditors took advice and made business decisions on this basis.

## CONCLUSIONS

The following conclusions can be drawn from the *Eurofood* judgment:

**Forum shopping.** The EU Insolvency Regulation explicitly addresses forum shopping. The fourth recital makes it clear that the regulation seeks to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another with the view of obtaining a more favorable legal position (forum shopping). Although the High Court has not explicitly stated this in its *Eurofood* judgment, the actions by Mr. Bondi could be viewed as inappropriate forum shopping. For practitioners in the field of restructurings and insolvencies, the *Eurofood* judgment is therefore a precedent that should be considered when, in cross-border restructurings of multinational debtors, the filing of insolvency proceedings are contemplated in Europe.

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<sup>1</sup> In interpreting the COMI concept and applying it to Eurofood, the High Court made explicit reference to the following legal sources: *EC Regulation on Insolvency Proceedings*, Moss, Fletcher and Issacs (2002); the Virgos Schmidt report; *In re Brac Rent a Car International Inc.* (2003), 2 All E.R. 201, Lloyd, J.; an English decision of His Honor Judge McGonigal in the case of *re Daisytec ISA Ltd.*; and *Geveran Trading Company Ltd. v. Skjevesland* (2003), BCC 209.

***Dutch and Luxembourg Parmalat entities.*** In its judgment of February 20, 2004, the Parma court based its conclusion that the COMI of Eurofood was in Italy on the following reasoning. Eurofood was a conduit for the financial policy of Parmalat and, although incorporated abroad, has as its exclusive point of reference the interests of the parent company of which it could be considered merely a financial division. Therefore, the main office, in the sense of actual operating office, coincided with the office in which Parmalat's driving management centre acted. Thus, jurisdiction on the part of the Italian judge existed and the Parma court was competent.

Interestingly enough, the Parma court used an almost identical reasoning to declare insolvent — and open main proceedings in Italy for — five Dutch Parmalat entities (Parma Food Corporation B.V., Dairies Holding International B.V., Parmalat Capital Netherlands B.V., Parmalat Finance Corporation B.V. and Parmalat Netherlands B.V.) and two Luxembourg Parmalat entities (Olex S.A. and Parmalat Soparfi S.A.). Unlike in *Eurofood*, where there was already an appointment of an Irish provisional liquidator before the Parma court judgment, none of these Dutch and Luxembourg Parmalat entities were already the subject of insolvency proceedings. Nevertheless, it could be argued — based on the High Court's determination of the COMI — that the COMI of the Dutch Parmalat entities is in the Netherlands and that the COMI of the Luxembourg Parmalat entities is in Luxembourg, not Italy.

#### IMPLICATIONS OF THE HIGH COURT'S DECISION

The implications of the High Court's decision could reach beyond Eurofood and whether its creditors are bound to participate in the reorganization of the Parmalat group. If creditors of the Dutch and Luxembourg Parmalat entities make applications to determine whether the COMI of those companies was properly determined to be in Italy and are successful, they could undermine Mr. Bondi's restructuring plan for the Parmalat group.

#### CONTACT INFORMATION

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