503 Strategies for Coping with Insolvent Customers & Suppliers

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Faculty Biographies

Johannes Boner

Hannes Boner has joined Sappi Fine Paper Europe (SFPE) in 2002 as legal counsel and acts also as legal compliance officer for Europe. SFPE is the European arm of South African based Sappi Ltd., the world's largest manufacturer of fine paper.

Prior to his SFPE assignement, Hannes worked for 13 years as a private practitioner in Brussels and in Zurich. He advised clients mainly on matters of EU law with special emphasis on antitrust and trade defense proceedings as well as on regulatory matters.

Hannes is a graduate from Fribourg university law school (Swizerland) and has obtained a post graduate degree from the College of Europe (DHEE) in Bruges (Belgium). Hannes is a fully qualified lawyer and admitted to the Zurich bar.

Yves Heijmans

Yves Heijmans is responsible for managing the legal support for the commercial operations of Chevron Phillips Chemical in Europe and Asia. Chevron Phillips Chemical is a joint venture between Chevron and ConocoPhillips and is one of the world's leading manufacturers of petrochemicals and plastics. It has 31 production facilities located in the United States, Puerto Rico, Singapore, China, South Korea, Saudi Arabia, Qatar, Mexico and Belgium.

Prior to joining Chevron Phillips Chemical , Mr. Heijmans served five years as international legal counsel at Alcatel.

Mr. Heijmans is a graduate of the University of Leuven (Belgium) and the University of Barcelona and obtained an LL.M degree from Cornell University.

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STRATEGIES FOR COPING WITH INSOLVENT CUSTOMERS & SUPPLIERS

Hannes Boner, Legal Counsel

Sappi Fine Paper Europe, Brussels

ACC Europe 2006 Annual Conference: Taking the Lead As In-House Counsel

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STARTING POINT: WHAT'S THE LAW?

- Insolvency ➔ no European (EU) harmonised concept
- Reference points only
  - Council Regulation 1346/2000 on insolvency proceedings, particularly Annexes A – C
  - Council Directive 35/000 on combating late payment in commercial transactions.

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SOME EU LAW PIPELINE

- Proposal for a Regulation of the EP and the Council establishing a European Small Claims Procedure COM (2005) 87 final

- Proposal for a Regulation of the EP and the Council creating a European order for payment procedure COM (2004) 0173 final

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NATIONAL LAWS

- Therefore widely divergent national laws apply.
- Wide variety of procedures in Europe
- Striking difference: speed of procedures, e.g.
  - I: recognition of creditor claim may take three years or more
  - UK: ownership of insolvent debtor may change within three days → blurring the picture of actual debtor's identity.

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WHAT'S THE ECONOMIC CONTEXT?

- **Payment uncertainties** are cited as the major obstacle in international trade and are one of the principal reasons for business insolvencies – irrespective of whether a company is locally, nationally or internationally active.
- Based on this it could be assumed that Credit Management – i.e. the transformation of turnover to actual cash flow – is one of the most developed processes in companies.
- The reality however shows another picture: in far too many companies the reminder process shows an important need for improvement

(source: Intrum Justitia, European Payment Index – Autumn 2005 – Follow up Report, p.2)

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GENERAL DISTINCTIONS

	Default	Insolvency
Customer	√	√
Supplier	√	√

- Default often precedes insolvency. Four basic scenarios to assess on a case-by-case basis.
- Preventive measures seek to decrease the risk of default whereas corrective/reactive measures are required in cases of insolvency.
- Customers owe in general money whereas Suppliers tend to furnish goods and services.

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SOME PREVENTIVE MEASURES WITH REGARD TO CUSTOMERS

- Retention of Title (ROT), but …
- Letters of Guarantee
- Credit insurance
- Credit worthiness analysis
- Avoid excessive outstanding debits
- Contractual exit clauses
- Last but in certain cases the best resort: old-fashioned but effective payment methods e.g. L/C, CAD, bills of exchange etc.

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SOME PREVENTIVE MEASURES WITH REGARD TO SUPPLIERS

- Early transfer of Title
- Personal performance guarantees
- No-prepayment arrangements
- Right to assign contractual performance to third party
- Workable contractual exit clauses

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INSOLVENCY – TWO MAIN TYPES

- Restructuring ➔ concerned party continues trading.
  Prospect of a higher dividend for creditors.
  Examples:
  Ausgleich (A), Insolvenzverfahren (D), redressment judiciaire (F), concordato preventivo (I), administration (UK), etc.
- Liquidation ➔ party is dissolved, stops trading and is deleted from commercial registry.
  Low, most often no dividend to be expected.
  Examples: Konkursverfahren (A and D), liquidation judiciaire (F), fallimento (I), winding up procedures (UK).

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INSOLVENCY – SOME PRACTICAL TIPS

- Customers
  - Trade only on a pre-payment basis
  - Beware of promises of preferential treatment due to re-payment risk
- Suppliers
  - Exercise contractually stipulated performance guarantees of either the insolvent supplier or its employees, subcontractors etc.
- Spend only money on local outside counsel if there is a realistic chance of a dividend that exceeds potential legal costs.

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FINAL REMARKS

- Close co-operation between purchasing (suppliers) and credit control (customers) with legal department to find tailor-made solutions.
- Legal department should establish network of outside counsels and negotiate special arrangements to deal with insolvency procedures.
- Consider outsourcing of credit management.

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STRATEGIES FOR COPING WITH INSOLVENT CUSTOMERS & SUPPLIERS

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A practical guide to European Insolvency Regulation 1346/2000

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Introduction to Insolvency Regulation

- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the "*Regulation*")
- Became effective on 31 May 2002
- Directly applicable throughout the EU (with the exception of Denmark)

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Purpose of Regulation

- Determine which EU country has jurisdiction to open cross-border insolvency proceedings
- Determine law applicable to cross-border insolvency proceedings
- But NOT an attempt to introduce a single European insolvency law

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When will the Regulation apply?

- The "centre of main interests" of the debtor must be in the EU
- Must be "collective insolvency proceedings" as listed in Annexes A and B of the Regulation
- Does not apply to insurance undertakings or credit institutions - Winding Up Directives

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Rules of jurisdiction

- Three types of insolvency proceedings:
  - **main proceedings** where debtor has its centre of main interests
  - **secondary proceedings** where debtor has an establishment
  - **territorial proceedings** where debtor has an establishment and before main proceedings are opened

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Definitions (1)

"**Centre of main interests**":

- not defined but rebuttable presumption that place of registered office - *article 3(1)*
- 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 (but can therefore change) - *recital (13)*

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Definitions (2)

"**Establishment**":

- defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means or goods - *article 2(h)*
- equivalent to a branch office or agency?
- mere presence of assets unlikely to be sufficient

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Main proceedings

- can be opened in the Member State where the debtor has its centre of main interests - *article 3(1)*
- universal scope and aim to encompass all the debtor's assets on an EU-wide basis
- any of the proceedings listed in Annex A (winding up or reorganisation proceedings)

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Secondary proceedings

- can be opened subsequently in any Member State where the debtor has an establishment - *article 3(3)*
- opened by either the office-holder in the main proceedings or any other person authorised to open secondary proceedings under local insolvency law
- limited in scope to assets located in that Member State
- only winding up proceedings listed in Annex B

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Territorial proceedings

- can be opened before the commencement of main proceedings in any Member State where the debtor has an establishment - *article 3(2)*

- can only be opened:
  - where main proceedings cannot be opened; or
  - where requested by creditor with domicile, residence or registered office in Member State or whose claim arise from the operation of the establishment - *article 3(4)*

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Recognition provisions

- Main proceedings to be recognised, and have same effects, in other Member States so long as no secondary proceedings - *articles 16 and 17*

- Foreign officeholder to be recognised in other Member States - *article 18*

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Coordination provisions

- Creditors may lodge claims in either or both of main and secondary proceedings - sharing rules if lodge claims in both
- Office-holders in main and secondary proceedings duty bound to communicate and co-operate
- Each office-holder to lodge claims in his proceedings in any other proceedings

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Hypothetical case: Seaview Ltd

- Seaview incorporated in the Bahamas but operationally based in the Netherlands
- Owns ship in Nice used as meeting place for clients
- Office and warehouse in Italy

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Insolvency of group of companies

- Insolvency regulation does not apply to group of companies
- Broad interpretation of COMI allows to open main proceedings for subsidiaries in the country where holding company is located
- Creates potential conflicts between jurisdictions

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The ISA Daisytek Problem

- UK court accepted COMI on 16th May over Germany and French registered companies
- German court decided COMI 19th May of commenced alternative Main Proceeding over German registered companies: reason for rejecting UK jurisdiction: public policy
- French courts decided COMI 26th May at commenced alternative Main Proceeding over French registered company: reason for rejecting UK jurisdiction: regulation does not apply to group of companies

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The ISA Daisytek Appeal Process

- No appeals launched in UK
- UK Administrators appealed to originating courts

  France: court of appeal of Versailles confirmed that the sole factor for deciding jurisdiction is the COMI and English court was first to assert jurisdiction based on COMI.

  Germany: closed main proceedings and opened secondary proceedings

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Eurofood

- Eurofood was a subsidiary of the Parmalat group and incorporated in Ireland.
- Irish court decided that COMI was Ireland:
  - Incorporated in Ireland
  - Day-to-day administration carried in Ireland
  - Creditor's perception was that COMI was in Ireland
- Italian court decided that COMI was in Italy:
  - Operating offices in Italy
  - Central management function in Italy

=> Referral to the European court of justice by Irish court

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Possibility of forum shopping

- Recital 4: "avoid incentives for the parties to transfer assets or judicial proceedings seeking to obtain a more favorable legal position"
- Italian company moves registered office to Luxemburg a few weeks before insolvency proceeding started (B&C case – Italian Corte di Cascazione)
- Parkside: UK court granted an administration order over a Polish incorporated company
- Reasons ? - director's liability regime
  - secured creditors legal regime
  - attractive reorganization procedures

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Applicable law provisions
article 4(2)

- Law of Member State where proceedings opened generally to determine effect of those proceedings, for example:
  - what assets form part of estate
  - powers of office-holder
  - conditions for set-off
  - effects of proceedings on current contracts
  - lodging and ranking of claims
  - effects of closure of proceedings
  - avoidance of transactions

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Impact of the Regulation on Security

- The "rights in rem"exception in Article 5 to the primary choice of law rule in Article 4
- Opening of insolvency proceedings shall not affect rights in rem of creditors in respect of debtor's assets situated within *another* Member State

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Impact of the Regulation on Security (*continued*)

- A "right in rem" includes:
  - right to dispose and to be repaid from the proceeds of the assets
  - right to the beneficial use of assets

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Impact of the Regulation on Security (*continued*)

- Determining location of right in rem under Article 2(g):
  - tangible property, the Member State where the asset is situated
  - registered property, the Member State where the asset register is kept
  - claims, where the obligor of the claim has its centre of main interests

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Impact of the Regulation on Security (*continued*)

- Exception ensures validity of floating security over collections of assets which change from time to time
- Problems could arise if obligor of the claim moves its COMI

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Impact of the Regulation on Set-off

- The "set-off"exception in Article 6 to the primary choice of law rule in Article 4
- Opening of insolvency proceedings shall not affect the right of creditors to demand set-off of claims where set-off is permitted by the law applicable to the insolvent debtor's claims

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Impact of the Regulation on Set-off (*continued*)

- Civil law: usually set-off restricted to cases where debts and credits arise between same parties in the context of a single transition.
- Common law: where mutual dealings between parties, application of set-off to determine net balance is automatic
- Still legal uncertainties with respect to netting agreements (termination and acceleration clauses)

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Impact of the Regulation on Reservation of Title

- The "reservation of title"exception in Article 7 to the primary choice of law rule in Article 4
- Opening of insolvency proceedings shall not affect the right of a seller to an asset based on reservation of title, where the asset is situated in *another* Member State

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Avoidance Rules

- Consider avoidance rules and effects of Article 13:
  - general rule is that law of Member State where insolvency proceedings opened will determine the insolvency avoidance rules - *Article 4(2)(m)*
  - BUT may be defence under Article 13 if the governing law of the transaction does not allow any means of challenging the detrimental act in the relevant case

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Avoidance rules (*continued*)

- Consider an Italian company which may be subject to main insolvency proceedings in Italy
- Under Italian insolvency law, it may be possible to challenge a transaction document under the Italian avoidance laws
- If the transaction document is governed by English law, and there is no means of challenging the transaction as a matter of English law, the counter party will have a defence under Article 13
- Care needed over choice of governing law

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COUNCIL REGULATION (EC) No 1346/2000
of 29 May 2000
on insolvency proceedings

(OJ L 160, 30.6.2000, p. 1)

Amended by:

		Official Journal No	page	date
►M1	Council Regulation (EC) No 603/2005 of 12 April 2005	L 100	1	20.4.2005

Amended by:

		Official Journal No	page	date
►A1	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

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COUNCIL REGULATION (EC) No 1346/2000

of 29 May 2000

on Insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the Economic and Social Committee [2],

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.

(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [3], as amended by the Conventions on Accession to this Convention [4].

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained

[1] Opinion delivered on 2 March 2000 (not yet published in the Official Journal).

[2] Opinion delivered on 26 January 2000 (not yet published in the Official Journal).

[3] OJ L 299, 31.12.1972, p. 32.

[4] OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1.

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in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

(13) The 'centre of main interests' 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.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

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(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors

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with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings: the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and

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of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (1). For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

(1) OJ L 166, 11.6.1998, p. 45.

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HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Article 2

Definitions

For the purposes of this Regulation:

(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) 'liquidator' shall mean 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;

(c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

(d) 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) 'judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) 'the time of the opening of proceedings' shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

(g) 'the Member State in which assets are situated' shall mean, in the case of:

— tangible property, the Member State within the territory of which the property is situated,

— property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

— claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

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Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. 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.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

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(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6

Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7

Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings

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the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9

Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Article 10

Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13

Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

— the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

— that law does not allow any means of challenging that act in the relevant case.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

— an immoveable asset, or

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— a ship or an aircraft subject to registration in a public register, or

— securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Article 15

Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18

Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the

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territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21

Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).

2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22

Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.

2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

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Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26 [1]

Public policy

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

[1] Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

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CHAPTER III

SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

(a) the liquidator in the main proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.

3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

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Article 32

Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.

3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

— at the request of the liquidator in the main proceedings,

— of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Article 34

Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

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Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Article 37 (1)

Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38

Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV

PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the

(1) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

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lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42

Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union.

2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading 'Lodgement of claim' in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V

TRANSITIONAL AND FINAL PROVISIONS

Article 43

Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44

Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:

(a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;

(b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;

(c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;

(d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;

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(e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

(f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;

(g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;

(h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;

(i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;

(j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;

(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990;

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(l) the Convention between the Federative People's Republic of Yugoslavia and the Kingdom of Greece on the Mutual Recognition and Enforcement of Judgments, signed at Athens on 18 June 1959;

(m) the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Arbitral Settlements in Commercial Matters, signed at Belgrade on 18 March 1960;

(n) the Convention between the Federative People's Republic of Yugoslavia and the Republic of Italy on Mutual Judicial Cooperation in Civil and Administrative Matters, signed at Rome on 3 December 1960;

(o) the Agreement between the Socialist Federative Republic of Yugoslavia and the Kingdom of Belgium on Judicial Cooperation in Civil and Commercial Matters, signed at Belgrade on 24 September 1971;

(p) the Convention between the Governments of Yugoslavia and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971;

(q) the Agreement between the Czechoslovak Socialist Republic and the Hellenic Republic on Legal Aid in Civil and Criminal Matters, signed at Athens on 22 October 1980, still in force between the Czech Republic and Greece;

(r) the Agreement between the Czechoslovak Socialist Republic and the Republic of Cyprus on Legal Aid in Civil and Criminal Matters, signed at Nicosia on 23 April 1982, still in force between the Czech Republic and Cyprus;

(s) the Treaty between the Government of the Czechoslovak Socialist Republic and the Government of the Republic of France on Legal Aid and the Recognition and Enforcement of Judgments in Civil, Family and Commercial Matters, signed at Paris on 10 May 1984, still in force between the Czech Republic and France;

(t) the Treaty between the Czechoslovak Socialist Republic and the Italian Republic on Legal Aid in Civil and Criminal Matters,

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signed at Prague on 6 December 1985, still in force between the Czech Republic and Italy;

(u) the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relationships, signed at Tallinn on 11 November 1992;

(v) the Agreement between Estonia and Poland on Granting Legal Aid and Legal Relations on Civil, Labour and Criminal Matters, signed at Tallinn on 27 November 1998;

(w) the Agreement between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed in Warsaw on 26 January 1993.

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2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46

Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

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ANNEX A

Insolvency proceedings referred to in Article 2(a)

BELGIË/BELGIQUE

— Het faillissement/La faillite

— Het gerechtelijk akkoord/Le concordat judiciaire

— De collectieve schuldenregeling/Le règlement collectif de dettes

— De vrijwillige vereffening/La liquidation volontaire

— De gerechtelijke vereffening/La liquidation judiciaire

— De voorlopige ontneming van beheer, bepaald in artikel 8 van de faillissementswet/Le dessaisissement provisoire, visé à l'article 8 de la loi sur les faillites

ČESKÁ REPUBLIKA

— Konkurs

— Nucené vyrovnání

— Vyrovnání

DEUTSCHLAND

— Das Konkursverfahren

— Das gerichtliche Vergleichsverfahren

— Das Gesamtvollstreckungsverfahren

— Das Insolvenzverfahren

EESTI

— Pankrotiinenetlus

ΕΛΛΑΣ

— Η πτώχευση

— Η ειδική εκκαθάριση

— Η προσωρινή διαχείριση εταιρείας. Η διοίκηση και διαχείριση των πιστωτών

— Η υπαγωγή επιχείρησης υπό επίτροπο με σκοπό τη σύναψη συμβιβασμού με τους πιστωτές

ESPAÑA

— Concurso

FRANCE

— Liquidation judiciaire

— Redressement judiciaire avec nomination d'un administrateur

IRELAND

— Compulsory winding up by the court

— Bankruptcy

— The administration in bankruptcy of the estate of persons dying insolvent

— Winding-up in bankruptcy of partnerships

— Creditors' voluntary winding up (with confirmation of a Court)

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

— Company examinership

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ITALIA

— Fallimento

— Concordato preventivo

— Liquidazione coatta amministrativa

— Amministrazione straordinaria

ΚΥΠΡΟΣ

— Υποχρεωτική εκκαθάριση από το Δικαστήριο

— Εκούσια εκκαθάριση υπό πιστωτές κατόπιν Δικαστικού Διατάγματος

— Εκούσια εκκαθάριση από μέλη

— Εκκαθάριση με την εποπτεία του Δικαστηρίου

— Πτώχευση κατόπιν Δικαστικού Διατάγματος

— Διαχείριση της περιουσίας προσώπων που απεβίωσαν ημερέγγυα

LATVIJA

— Bankrots

— Izlīgums

— Sanācija

LIETUVA

— įmonės restruktūrizavimo byla

— įmonės bankroto byla

— įmonės bankroto procesas ne teismo tvarka

LUXEMBOURG

— Faillite

— Gestion contrôlée

— Concordat préventif de faillite (par abandon d'actif)

— Régime spécial de liquidation du notariat

MAGYARORSZÁG

— Csődeljárás

— Felszámolási eljárás

MALTA

— Xoljiment

— Amministrazzjoni

— Stralċ volontarju mill-membri jew mill-kredituri

— Stralċ mill-Qorti

— Falliment f'każ ta' negozjant

NEDERLAND

— Het faillissement

— De surséance van betaling

— De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Das Konkursverfahren

— Das Ausgleichsverfahren

POLSKA

— Postępowanie upadłościowe

▼M1

— Postępowanie układowe

— Upadłość obejmująca likwidację

— Upadłość z możliwością zawarcia układu

PORTUGAL

— O processo de insolvência

— O processo de falência

— Os processos especiais de recuperação de empresa, ou seja:

— À concordata

— A reconstituição empresarial

— A reestruturação financeira

— A gestão controlada

SLOVENIJA

— Stečajni postopek

— Skrajšani stečajni postopek

— Postopek prisilne poravnave

— Prisilna poravnava v stečaju

SLOVENSKO

— Konkurzné konanie

— Vyrovnanie

SUOMI/FINLAND

— Konkurssi/konkurs

— Yrityssaneeraus/företagssanering

SVERIGE

— Konkurs

— Företagsrekonstruktion

UNITED KINGDOM

— Winding up by or subject to the supervision of the court

— Creditors' voluntary winding up (with confirmation by the court)

— Administration, including appointments made by filing prescribed documents with the court

— Voluntary arrangements under insolvency legislation

— Bankruptcy or sequestration

▼M1

ANNEX B

Winding-up proceedings referred to in Article 2(c)

BELGIË/BELGIQUE

— Het faillissement/La faillite

— De vrijwillige vereffening/La liquidation volontaire

— De gerechtelijke vereffening/La liquidation judiciaire

ČESKÁ REPUBLIKA

— Konkurs

— Nucené vyrovnání

DEUTSCHLAND

— Das Konkursverfahren

— Das Gesamtvollstreckungsverfahren

— Das Insolvenzverfahren

EESTI

— Pankrotimenetlus

ΕΛΛΑΣ

— Η πτώχευση

— Η ειδική εκκαθάριση

ESPAÑA

— Concurso

FRANCE

— Liquidation judiciaire

IRELAND

— Compulsory winding up

— Bankruptcy

— The administration in bankruptcy of the estate of persons dying insolvent

— Winding-up in bankruptcy of partnerships

— Creditors' voluntary winding up (with confirmation of a court)

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA

— Fallimento

— Liquidazione coatta amministrativa

— Concordato preventivo con cessione dei beni

ΚΥΠΡΟΣ

— Υποχρεωτική εκκαθάριση από το Δικαστήριο

— Εκκαθάριση με την εποπτεία του Δικαστηρίου

— Εκούσια εκκαθάριση από πιστωτές (με την επικύρωση του Δικαστηρίου)

— Πτώχευση

— Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα

▼M1

LATVIJA

— Bankrots

LIETUVA

— įmonės bankroto byla

— įmonės bankroto procesas ne teismo tvarka

LUXEMBOURG

— Faillite

— Régime spécial de liquidation du notariat

MAGYARORSZÁG

— Felszámolási eljárás

MALTA

— Stralċ volontarju

— Stralċ mill-Qorti

— Falliment inkluż il-ħruġ ta' mandat ta' qbid mill-Kuratur f'każ ta' negozjant fallut

NEDERLAND

— Het faillissement

— De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

Das Konkursverfahren

POLSKA

— Postępowanie upadłościowe

— Upadłość obejmująca likwidację

PORTUGAL

— O processo de insolvência

— O processo de falência

SLOVENIJA

— Stečajni postopek

— Skrajšani stečajni postopek

SLOVENSKO

— Konkurzné konanie

— Vyrovnanie

SUOMI/FINLAND

— Konkurssi/konkurs

SVERIGE

— Konkurs

UNITED KINGDOM

— Winding up by or subject to the supervision of the court

— Winding up through administration, including appointments made by filing prescribed documents with the court

— Creditors' voluntary winding up (with confirmation by the court)

— Bankruptcy or sequestration

▼M1

ANNEX C

Liquidators referred to in Article 2(b)

BELGIË/BELGIQUE

— De curator/Le curateur

— De commissaris inzake opschorting/Le commissaire au sursis

— De schuldbemiddelaar/Le médiateur de dettes

— De vereffenaar/Le liquidateur

— De voorlopige bewindvoerder/L'administrateur provisoire

ČESKÁ REPUBLIKA

— Správce podstaty

— Předběžný správce

— Vyrovnací správce

— Zvláštní správce

— Zástupce správce

DEUTSCHLAND

— Konkursverwalter

— Vergleichsverwalter

— Sachwalter (nach der Vergleichsordnung)

— Verwalter

— Insolvenzverwalter

— Sachwalter (nach der Insolvenzordnung)

— Treuhänder

— Vorläufiger Insolvenzverwalter

EESTI

— Pankrotihaldur

— Ajutine pankrotihaldur

— Usaldusisik

ΕΛΛΑΣ

— Ο σύνδικος

— Ο προσωρινός διαχειριστής. Η διοικούσα επιτροπή των πιστωτών

— Ο ειδικός εκκαθαριστής

— Ο επίτροπος

ESPAÑA

— Administradores concursales

FRANCE

— Représentant des créanciers

— Mandataire liquidateur

— Administrateur judiciaire

— Commissaire à l'exécution de plan

IRELAND

— Liquidator

— Official Assignee

▼M1

- Trustee in bankruptcy
- Provisional Liquidator
- Examiner

ITALIA

- Curatore
- Commissario
- Liquidatore giudiziale

ΚΥΠΡΟΣ

- Εκκαθαριστής και Προσωρινός Εκκαθαριστής
- Επίσημος Παραλήπτης
- Διαχειριστής της Πτώχευσης
- Εξεταστής

LATVIJA

- Maksātnespējas procesa administrators

LIETUVA

- Bankrutuojančių įmonių administratorius
- Restruktūrizuojamų įmonių administratorius

LUXEMBOURG

- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d'assainissement du notariat

MAGYARORSZÁG

- Csődeljárás
- Felszámolási eljárás

MALTA

- Amministratur Proviżorju
- Riċevitur Uffiċjali
- Stralċjarju
- Manager Speċjali
- Kuraturi f'każ ta' proċeduri ta' falliment

NEDERLAND

- De curator in het faillissement
- De bewindvoerder in de surséance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

- Masseverwalter
- Ausgleichsverwalter
- Sachverwalter
- Treuhänder
- Besondere Verwalter
- Konkursgericht

▼M1

POLSKA

— Syndyk

— Nadzorca sądowy

— Zarządca

PORTUGAL

— Administrador da insolvência

— Gestor judicial

— Liquidatário judicial

— Comissão de credores

SLOVENIJA

— Upravitelj prisilne poravnave

— Stečajni upravitelj

— Sodišče, pristojno za postopek prisilne poravnave

— Sodišče, pristojno za stečajni postopek

SLOVENSKO

— Správca

— Predbežný správca

— Nútený správca

— Likvidátor

SUOMI/FINLAND

— Pesänhoitaja/boförvaltare

— Selvittäjä/utredare

SVERIGE

— Förvaltare

— God man

— Rekonstruktör

UNITED KINGDOM

— Liquidator

— Supervisor of a voluntary arrangement

— Administrator

— Official Receiver

— Trustee

— Provisional Liquidator

— Judicial factor

Notice for the OJ

Reference for a preliminary ruling by the Supreme Court, Ireland, by order of that court dated 27 July 2004, in the matter of Eurofood IFSC Ltd and in the matter of the Companies Acts 1963 to 2003, Enrico Bondi against Bank of America N.A., Pearse Farrell (the Official Liquidator), Director of Corporate Enforcement and the Certificate/Note holders.

(Case C-341/04)

Reference has been made to the Court of Justice of the European Communities by order of the Supreme Court, Ireland, dated 27 July 2004, which was received at the Court Registry on 9 August 2004, for a preliminary ruling in the matter of Eurofood IFSC Ltd and in the matter of the Companies Acts 1963 to 2003, Enrico Bondi against Bank of America N.A., Pearse Farrell (the Official Liquidator), Director of Corporate Enforcement and the Certificate/Note holders on the following questions:

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?[1]

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?

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?

Where,

the registered offices of a parent company and its subsidiary are in two different member states,

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

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?

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?

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[1] - of 29 May 2000 on insolvency proceedings (OJ L 160, 30.06.2000, p. 1).

ORDER OF THE PRESIDENT OF THE COURT
15 September 2004 (1)

(Accelerated procedure)

In Case C-341/04,

REFERENCE for a preliminary ruling under Article 234 EC

from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings

Enrico Bondi

v

Bank of America N.A.

and

Pearse Farrell, Official Liquidator

and

Director of Corporate Enforcement

and

Certificate/Note holders,

THE PRESIDENT OF THE COURT,

having regard to the proposal from Judge Jann, Judge-Rapporteur,

after hearing Advocate General Jacobs,

makes the following

Order

1 The reference for a preliminary ruling concerns the interpretation of Articles 1, 2, 3, 16 and 17 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

2 The reference was made in the course of a dispute between Mr Bondi, on the one hand, and the Bank of America NA, Mr Farrell, the Director of Corporate Enforcement and the holders of notes

issued by Eurofoods IFSC Limited ('Eurofoods'), on the other, relating to the recognition in Ireland of a decision made by an Italian court appointing an extraordinary administrator in connection with the insolvency of the Parmalat Group.

3 According to the order for reference, on 24 December 2003, pursuant to Decree Law No 347 of 23 December 2003 on urgent measures for the industrial restructuring of large insolvent undertakings (Guri No 298 of 24 December 2003), the Italian Minister for Production Activities admitted Parmalat SpA to extraordinary administration proceedings and appointed Mr Bondi as extraordinary administrator of that company.

4 On 27 January 2004 the Bank of America NA requested the High Court (Ireland) to open insolvency proceedings in respect of Eurofoods, a company incorporated and registered in Ireland, which is a subsidiary of Parmalat SpA. Upon presentation of that application, the High Court appointed Mr Farrell as provisional liquidator.

5 On 20 February 2004 the District Court in Parma (Italy) decided to open insolvency proceedings concerning Eurofoods and appointed Mr Bondi as extraordinary administrator.

6 On 23 March 2004 the High Court held that the insolvency proceedings in respect of Eurofoods had been opened on 27 January 2004, refused to recognise the decision of the Parma District Court, and confirmed Mr Farrell as liquidator.

7 Following an appeal by Mr Bondi, the Supreme Court considered that it was necessary, before giving its ruling, to refer five questions to the Court of Justice for a preliminary ruling.

8 By separate letter of 5 August 2004, the Supreme Court requested the Court of Justice to apply the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure.

9 According to that provision, at the request of the national court, the President of the Court of Justice may exceptionally decide, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to apply an accelerated procedure derogating from the provisions of the Rules of Procedure, where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency.

10 In the present case, the national court observes that the appointment of a liquidator by an Irish court, on the one hand, and that of an extraordinary administrator by an Italian court, on the other, will render it impossible, in practice, to administer the assets of the insolvent company and that this will be to the detriment of the creditors.

11 In that regard, the Court notes that the aim of the regulation which it is requested to interpret is in particular to establish rules governing jurisdiction over the opening of insolvency proceedings with cross-border effects and rules for the recognition of decisions made by the courts of the Member States relating to the opening of such proceedings. It is therefore apparent that a conflict between the courts of two Member States which consider themselves to have jurisdiction to open insolvency proceedings, such as the conflict in the main proceeding, is within the scope of the essential subject matter of the regulation.

12 On the other hand, the economic interests to which the national court refers, although significant and legitimate, are not of such a nature as to establish the existence of exceptional urgency within the meaning of the first paragraph of Article 104a of the Rules of Procedure.

13 Consequently, the circumstances referred to do not establish that a ruling on the questions referred to the Court is a matter of exceptional urgency.

On those grounds, the President of the Court hereby orders:

The request for the application of the accelerated procedure to Case C-341/04 in accordance with the first paragraph of Article 104a of the Rules of Procedure is rejected.

Signatures.

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1 - Language of the case: English.

OPINION OF ADVOCATE GENERAL
JACOBS
delivered on 27 September 2005 (1)

Case C-341/04

Eurofood IFSC Ltd

1. The present case, referred by the Supreme Court of Ireland, arises out of the insolvency of the Parmalat group of companies. It concerns in particular the question whether the Insolvency Proceedings Regulation (2) requires that an Irish subsidiary of the Italian holding company Parmalat SpA ('Parmalat') should be wound up in Ireland or in Italy.

The Insolvency Proceedings Regulation

2. The Regulation is the successor of the European Union Convention on Insolvency Proceedings ('the Convention'), itself the culmination of over 25 years of discussion and negotiation. The Convention did not come into effect since the United Kingdom failed to sign it by the agreed deadline of 23 May 1996. (3) The text of the Regulation is however, for the purposes of the present case, identical in all material respects to the text of the Convention. (4) In those circumstances I consider that the explanatory report on the Convention written by Professor Virgós and Mr Schmit ('the Virgós-Schmit Report') (5) may provide useful guidance when interpreting the Regulation. (6)

3. The Regulation was adopted on the basis of Articles 61(c) and 67(1) EC, on the initiative of Germany and Finland. (7) It essentially provides for the allocation of jurisdiction and the applicable law with regard to, and mutual recognition of, insolvency proceedings within its scope, namely 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'. (8) The Regulation makes no provision for groups of companies; each company subject to insolvency proceedings is a 'debtor' in its own right for the purpose of the Regulation. (9)

4. Recital 2 in the preamble states:

'The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective'.

5. Recital 4 states:

'It is necessary for the proper functioning of the internal market to avoid incentives for the parties [to insolvency proceedings] to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).'

6. The first sentence of recital 11 states:

'This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community'.

7. Recital 13 states:

'The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties.'

8. Recital 16 states:

'The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. ... [A] liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.'

9. Recital 22 states:

'This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.'

10. Recital 23 states:

'... Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). ... [T]he *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.'

11. Article 1(1) 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.'

12. Article 2 includes the following definitions for the purpose of the Regulation:

'(a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) "liquidator" shall mean 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;

...

(e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not'.

13. Annex A includes (under 'Ireland') 'Compulsory winding up by the court'. Annex C includes (under Ireland) 'Provisional liquidator'. (10)

14. Article 3 of the Regulation provides in so far as relevant:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. 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.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.'

15. The effect of Article 3 is to distinguish between two types of insolvency proceedings. Those falling under Article 3(1), namely those opened by the courts of the Member State where the centre of the debtor's main interests is situated, are generally referred to as 'main [insolvency] proceedings'. Those falling under Article 3(2), namely those opened by the courts of another Member State where the debtor possesses an establishment, and limited to the assets situated in that State, are generally referred to as 'secondary [insolvency] proceedings'.

16. Article 4(1) lays down the general rule that 'the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened ...'. Article 4(2) specifies that the law of the State of the opening of proceedings 'shall determine the conditions for the opening of those proceedings, their conduct and their closure'.

17. The first subparagraph of Article 16(1) provides:

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.'

18. Article 26 provides:

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

19. Article 38 provides:

'Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of the insolvency proceedings and the judgment opening the proceedings.'

Relevant provisions of Irish law

20. Section 212 of the Companies Act, 1963, confers on the High Court jurisdiction to wind up any company.

21. Section 215 of that Act provides that an application to the court for the winding up of a company is to be by petition presented either by the company or by any creditor or creditors.

22. Section 220 provides as follows:

'1. Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

2. In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.'

23. Section 226(1) provides that the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before the first appointment of liquidators, which by virtue of section 225 is otherwise made at the time the winding-up order is made. Pursuant to section 229(1), a provisional liquidator, once appointed, is obliged to 'take into his custody or under his control all the property and things in action to which the company is or appears to be entitled'.

The corporate background to the insolvency proceedings

24. The following facts – and those summarised in the next section – are taken from the order for reference.

25. Eurofood IFSC Ltd ('Eurofood') is a company incorporated and registered in Ireland. It is a wholly owned subsidiary of Parmalat, a company incorporated in Italy which operated through subsidiary companies in more than 30 countries worldwide. Eurofood's principal objective was the provision of financing facilities for companies in the Parmalat group.

26. Eurofood's registered office is at the International Financial Services Centre, Dublin ('IFSC'). The IFSC was established to provide a location for internationally traded financial services to be provided only to non-resident persons or bodies. Eurofood carried on business at the IFSC as required by law.

27. Bank of America NA ('Bank of America'), a bank established in the United States with branches in Dublin and Milan, managed the day-to-day administration of Eurofood in accordance with the terms of an administration agreement.

28. Eurofood engaged in the following three large financial transactions:

(a) on 29 September 1998 Eurofood issued notes by way of private placement in an aggregate amount of USD 80 000 000 (to provide collateral for a loan by Bank of America to Venezuelan companies in the Parmalat group);

(b) on 29 September 1998 Eurofood issued notes by way of private placement in an aggregate amount of USD 100 000 000 (to fund a loan by Eurofood to Brazilian companies in the Parmalat group);

(c) there was a 'Swap' agreement with Bank of America dated 10 August 2001.

29. Eurofood's liabilities under the first two transactions were guaranteed by Parmalat.

30. Eurofood's creditors under the first two transactions ('the Certificate/Note Holders') are now owed in excess of USD 122 million. Eurofood is unable to pay its debts.

The [32703minsolvency proceedings in Ireland and Italy

Italy

31. Parmalat was discovered in late 2003 to be in deep financial crisis, which led to the insolvency of many of its key companies.

32. On 23 December 2003 the Italian Parliament passed into law decree No 347 providing for the extraordinary administration of companies with more than 1 000 employees and debts of no less than EUR 1 billion.

33. On 24 December 2003 Parmalat was admitted to extraordinary administration proceedings by the Ministero delle Attivite Produttive (Italian Ministry of Productive Activities). Dr Enrico Bondi was appointed as extraordinary administrator.

34. On 27 December 2003 the Civil and Criminal Court at Parma ('the Parma court') confirmed that Parmalat was insolvent and placed it in extraordinary administration.

Ireland

35. On 27 January 2004 Bank of America presented to the High Court of Ireland ('the Irish court') a petition for the winding up of Eurofood, alleging that Eurofood was insolvent and claiming a debt due to it of in excess of USD 3.5 million.

36. On the same date Bank of America also applied ex parte for the appointment of a provisional liquidator. On that date the Irish court appointed Mr Pearse Farrell as provisional liquidator to 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 a solicitor.

Italy

37. On 9 February 2004 the Italian Ministry of Productive Activities admitted Eurofood, as a group company, to the extraordinary administration of Parmalat.

38. On 10 February the Parma court made an order in which it acknowledged the filing of a petition to declare the insolvency of Eurofood and set 17 February 2004 as the date for the hearing of that petition.

39. Mr Farrell was legally represented before the Parma court at that hearing. However, despite an order of the court and what Mr Farrell has described as 'repeated written and verbal requests' to Dr Bondi, he had not received any of the documents filed with the court, including the petition and the papers upon which Dr Bondi proposed to rely.

40. On 20 February 2004 the Parma court gave judgment opening insolvency proceedings concerning Eurofood, declaring it to be insolvent, determining that the centre of its main interests was in Italy and appointing Dr Bondi as extraordinary administrator.

Ireland

41. Bank of America's petition for the winding-up of Eurofood was heard in the Irish court from 2 to 4 March 2004. Bank of America, Mr Farrell, the Certificate/Note Holders and the Director of Corporate Enforcement (11) were represented. On 23 March 2004 the Irish court ruled that:

'(1) Insolvency proceedings had been opened in Ireland at the date of the presentation of the petition.

(2) Eurofood's centre of main interests was in Ireland and therefore the proceedings opened in Ireland as of 27 January 2004 were main insolvency proceedings within the meaning of the Insolvency Proceedings Regulation.

(3) The purported opening of main insolvency proceedings by the Parma court was contrary to recital 22 and Article 16 of the Regulation and could not alter the fact that main insolvency proceedings were already extant in Ireland.

(4) The failure of Dr Bondi to put Eurofood's creditors on notice of the hearing before the Parma court despite that court's directions on the matter and the failure to furnish Mr Farrell with the petition or other papers grounding the application until after the hearing had taken place all amounted to a lack of due process such as to warrant the Irish courts refusing to give recognition to the decision of the Parma court under Article 26 of the Regulation.'

42. In the light of those conclusions and in circumstances where Eurofood was grossly insolvent, the Irish court made a winding-up order in respect of Eurofood and appointed Mr Farrell as liquidator. The Irish court did not recognise the decision of the Parma court of 20 February 2004.

The appeal and the questions referred

43. Dr Bondi appealed to the Supreme Court against the judgment of the Irish court. The principal subjects of argument on the hearing of the appeal were whether insolvency proceedings had been first opened in Ireland or Italy, whether the centre of Eurofood's main interests was in Ireland or Italy and whether there had been such an absence of fair procedures leading up to the decision of the Parma court that that decision should not be recognised.

44. The Supreme Court decided to stay the proceedings and refer the following questions relating to those three areas of dispute to the Court of Justice for a preliminary ruling:

'(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 ... insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346/2000?

(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?'

45. Written observations have been submitted by Dr Bondi, Mr Farrell, the Director of Corporate Enforcement, Bank of America, the Certificate/Note holders, the Austrian, Czech, Finnish, French, German, Hungarian, Irish and Italian Governments and the Commission. With the exception of the Austrian, German and Hungarian Governments, those parties were also represented at the hearing.

46. Mr Farrell explains that it is the convention that a provisional liquidator does not participate, at the hearing of the winding-up petition, in any argument on the merits of the case; similarly, where the decision of the High Court to wind up the company is subject to appeal to the Supreme Court, the liquidator does not involve himself in the merits of the appeal. Mr Farrell accordingly does not consider it appropriate to urge any answer on the Court of Justice in relation to the questions referred, although he offers observations for the assistance of the Court on certain factual matters which he considers to be relevant to the fifth question referred.

The first question: the 'judgment opening insolvency proceedings'

47. By its first question the referring court asks whether, 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, that order combined with the presentation of the petition constitutes a 'judgment opening insolvency proceedings' within the meaning of Article 16 of the Regulation.

48. That question arises because of the chronology of the early stages of the Irish and the Italian proceedings. On 27 January 2004 Bank of America presented to the Irish court a petition to wind up Eurofood and that court appointed Mr Farrell as provisional liquidator. On 20 February 2004 the Parma court declared Eurofood to be insolvent and appointed Dr Bondi as extraordinary administrator. On 23 March 2004 the Irish court ruled that insolvency proceedings had been opened in Ireland at the date of the presentation of the petition. If the appointment of Mr Farrell in conjunction with the presentation of the petition on 27 January 2004 is a 'judgment opening insolvency proceedings' within the meaning of Article 16 of the Regulation, the Parma court will be bound by that provision to recognise that judgment.

49. Dr Bondi and the Austrian, French and Italian Governments contend that the question should be answered in the negative: the presentation of the petition and the appointment of a provisional liquidator do not constitute a 'judgment opening insolvency proceedings' within the meaning of Article 16. Bank of America, the Director of Corporate Enforcement, the Certificate/Note Holders, the Irish, Czech, Finnish and German Governments and the Commission take the contrary view.

50. Initially, I will address the position of those latter parties that the first question referred should be answered in the affirmative. I will then examine the arguments of Dr Bondi and the Austrian, French and Italian Governments as to why a negative answer should be given.

51. I agree with the submission that the first question calls for an affirmative answer. In my view, that approach follows from the object and purpose, the scheme and the wording of the Regulation.

52. Recital 2 in the preamble refers to the objective that 'cross-border insolvency proceedings should operate efficiently and effectively'. Recital 4 refers to the necessity 'to avoid incentives for the parties [to insolvency proceedings] to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)'. Article 16 requires that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction is to be recognised in all the other Member States from the time that it becomes effective in the State where it was delivered. Recital 22 states that recognition of judgments 'should be based on the principle of mutual trust'.

53. Within that framework, and as the Czech Government and the Commission stress, it is imperative that recognition should be accorded at an early stage in the proceedings. It is for that reason, presumably, that Article 16 requires recognition from the time the judgment becomes effective as a matter of national law and that Article 2(f) provides that that rule applies whether the judgment is final or not. (12)

54. In that context, where a national court entertaining a petition for liquidation on the ground of insolvency appoints 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', it would seem consistent with the aim of the Regulation that that appointment should be regarded as a judgment opening insolvency proceedings.

55. With regard to the wording of the Regulation, both 'judgment' and 'insolvency proceedings' are defined.

56. Article 2(a) defines 'insolvency proceedings' as meaning 'the collective proceedings referred to in Article 1(1)' and adds: 'These proceedings are listed in Annex A'. In the case of Ireland, 'compulsory winding-up by the Court' is listed as one of the insolvency proceedings in that annex.

57. It seems therefore that the proceedings before the national court could be considered to be the opening of 'insolvency proceedings' for the purpose of the Regulation.

58. Article 2(e) defines '"judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator' as including 'the decision of any court empowered to open such proceedings or to appoint a liquidator'.

59. Article 2(b) defines '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' and adds 'Those persons and bodies are listed in Annex C'. For the purposes of Ireland, that list includes a provisional liquidator.

60. It seems therefore that a decision of an Irish court appointing a provisional liquidator, listed in Annex C to the Regulation, in the context of a compulsory winding up by the court, listed in Annex A thereto, must be a 'judgment opening insolvency proceedings' within the meaning of Article 16. That view has even more force when it is remembered that the appointment of a provisional liquidator is the first form of court order that can possibly be made in a compulsory winding-up procedure under Irish law.

61. I do not consider that the above analysis by reference to the inclusion of the Irish 'provisional liquidator' in Annex C involves reasoning 'backwards and illogically', as described in Dr Bondi's observations. On the contrary, the appointment of such an office-holder seems central to the concept of a 'judgment opening insolvency proceedings'.

62. Admittedly, Article 2(e) could be interpreted more narrowly, as defining '"judgment" in relation to the opening of insolvency proceedings' as including 'the decision of any court empowered to open such proceedings' and, separately, '"judgment" in relation to ... the appointment of a liquidator' as including 'the decision of any court empowered to ... appoint a liquidator'. If that were the case, it could be argued that a decision appointing a liquidator would not constitute a judgment opening insolvency proceedings within the meaning of that definition.

63. However, as the national court points out in the order for reference, the definition in Article 2 (e) of the appointment of a liquidator as a 'judgment' does not appear to serve any purpose within the Regulation if it does not benefit from the recognition provided by Article 16. Certainly there are no provisions in the Regulation which specifically deal with judgments appointing a liquidator. Moreover – and also as the referring court points out – the appointment of a liquidator is an essential component of the notion of 'collective insolvency proceedings' within the scope of Article 1 (1).

64. Finally on this point, and as the Director of Corporate Enforcement submits, the definition in Article 2(e) may be intended to reflect the reality that in various jurisdictions there are different ways in which insolvency proceedings may be commenced, rather than to make a distinction between a decision of a court opening insolvency proceedings on the one hand and the appointment of a liquidator on the other; the purpose of the definition is accordingly to ensure that the Regulation confers automatic recognition on insolvency proceedings opened in both ways.

65. It seems therefore more natural to read Article 2(e) as defining '"judgment" in relation to the opening of insolvency proceedings' as including 'the decision of any court empowered to ... appoint a liquidator', and hence as supporting the view set out in point 60.

66. A number of arguments have been adduced against that view.

67. First, Dr Bondi and the Italian Government submit that the Regulation distinguishes in particular between the concepts of 'request' and 'opening', which correspond precisely to the Irish steps 'petition' and 'winding-up order'. In that context Dr Bondi and the Italian Government cite recital 16 and Article 38 of the Regulation.

68. Similarly, those parties submit that a 'provisional liquidator' is simply a 'temporary administrator' as referred to in Article 38, also described in recital 16 in the preamble as 'a liquidator temporarily appointed prior to the opening of the maininsolvency proceedings'; his appointment cannot therefore open the main proceedings.

69. In similar vein, the Austrian Government submits that, since a 'temporary administrator' has only limited powers under Article 38 of the Regulation, he cannot be a 'liquidator' within the meaning of the definition in Article 2(b), which refers to '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'.

70. Those arguments however appear to me to disregard the more general provisions of the Regulation referred to above and their application to the present case and to misunderstand the more specific aim of Article 38. That provision complements Article 29, which provides that a liquidator in main insolvency proceedings within the meaning of the Regulation may request that secondary proceedings be opened. (13) Where a request to open main proceedings has been made but a liquidator within the meaning of the [32703mRegulation has not yet been appointed, Article 38 provides that a 'temporary administrator' appointed by the court with jurisdiction to open main proceedings may take measures to preserve assets of the debtor in another Member State 'for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings'. A provisional liquidator appointed in proceedings for compulsory winding-up by the court in Ireland, however, falls within the definition of 'liquidator' for the purposes of the Regulation in general and Article 29 in particular. (14)

71. Moreover the order appointing the provisional liquidator in the present case gives him extensive powers (to take possession of all of Eurofood's assets, to manage its affairs, to open a bank account in its name and to retain the services of a solicitor); the provisional liquidator's role is accordingly much wider than the role of the temporary administrator apparently envisaged in Article 38.

72. Where, furthermore, a petition is presented for insolvency proceedings of a type listed in Annex A to the Regulation and on the same date the court appoints a liquidator of a type listed in Annex C thereto, as in the present case, it seems clear that 'insolvency proceedings' within the meaning of Article 1(1) of the Regulation have been opened. I do not see how Article 38 can be relevant in those circumstances.

73. More generally, it does not in my view follow that presentation of a petition for compulsory winding up combined with the appointment of a liquidator within the meaning of the Regulation cannot be a 'judgment opening insolvency proceedings' within the meaning of Article 16 merely because such a petition may be analysed as a 'request for the opening of insolvency proceedings'.

74. It does not in any event seem to me to that, as argued in the written observations of Dr Bondi, the Regulation 'reveals a very clear pattern' with regard to the 'three stages' of 'request', 'temporary appointment' and 'opening'. Apart from Article 38, which as explained above concern a specific situation which may arise in the context of secondary proceedings, 15) and a further reference in the third subparagraph of Article 25(1), which also concerns interlocutory preservation measures, there is no other suggestion in the body of the Regulation that proceedings will necessarily involve a separate 'request' for the opening followed after a lapse of time by the 'judgment opening insolvency proceedings'.

75. Dr Bondi mentions in addition that the 'contrast between the Request and Opening can for example be seen clearly from Article 3(4)'. That provision, however, merely refers to a request for the opening of (secondary) proceedings, with no suggestion of a necessary time lapse between the two stages.

76. Article 38 is thus the only provision in the body of the Regulation which makes such a distinction, manifestly an insufficient incidence from which to deduce a 'very clear pattern'. To my mind, Article 38 simply provides for a situation which may arise in the context of a national type of insolvency proceeding which does in fact involve two separate stages, between which it may in certain circumstances be appropriate to appoint a temporary administrator; it cannot be deduced from Article 38 that all types of insolvency proceeding necessarily involve two stages.

77. It is moreover clear from the preamble that the Regulation does not seek to harmonise national law. Recital 11 in the preamble states: 'This Regulation acknowledges the fact that as a

result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community'. Nor indeed could legislation based on Articles 61(c) and 67(1) EC so harmonise national law.

78. Second, Dr Bondi argues that there is no such insolvency proceeding listed under Ireland in Annex A to the Regulation as 'provisional liquidation'. That however is to my mind irrelevant to the present proceedings, which concern compulsory winding up by the court, within the scope of the Regulation by virtue of its inclusion in the list in Annex A.

79. Next, a number of arguments are adduced to the effect that proceedings of the type at issue do not fall within the scope of the Regulation because for one reason or another they do not satisfy the definition in Article 1(1), which refers to 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

80. Thus, Dr Bondi submits that a compulsory winding up by the court in Ireland falls within the scope of the Regulation only if it is an insolvency proceeding in accordance with Article 1(1), and hence only if the national court is satisfied that the insolvency ground of jurisdiction has been proved. (16) Until the winding-up order is made, there is no finding of insolvency. The Italian Government made similar submissions at the hearing.

81. In my view, that argument cannot be accepted. In the present case, the referring court's first question assumes that the petition presented is 'for the winding up of an insolvent company'. In those circumstances, it would not be appropriate for this Court to question the underlying premiss.

82. Dr Bondi further submits that in the context of a compulsory winding up by the court in Ireland, the statutory system of realising and distributing the assets and seeking and considering creditors' claims takes effect only after the winding-up order is made; only at that point therefore is there truly a 'collective' insolvency proceeding within the meaning of Article 1(1) of the Regulation.

83. That argument however to my mind misinterprets the scheme of the Regulation. While Article 1(1) certainly contains a definition of the insolvency proceedings within the scope of the Regulation, that provision cannot be construed in isolation from the definitions in Article 2.

84. The effect of Article 2(a) is that 'the collective proceedings referred to in Article 1(1)' are 'listed in Annex A'. There is consensus among commentators on the Regulation that 'once the proceedings have been included in the list, the Regulation applies without any further review by the courts of other Member States'. (17) Since compulsory winding up by the court in Ireland is included in Annex A, I do 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 in Article 1(1) are not satisfied.

85. In any event, the referring court states in the order for reference that the provisional liquidator 'represents and is bound to protect the interests of all creditors and to take possession of the assets'.

86. Finally, the French Government refers to the four conditions which on the basis of the wording of Article 1(1) must be satisfied in order for insolvency proceedings to fall within the scope of the Regulation: the proceedings must be collective, the debtor must be insolvent, there must be partial or total disinvestment of the debtor and a liquidator must be appointed. The French Government submits that, since the definition of 'insolvency proceedings' in Article 2(a) and Annex A does not include the appointment of a provisional liquidator, such appointment cannot be an 'insolvency proceeding' within the meaning of the Regulation.

87. Again however that argument seems to me to betray a misunderstanding of the scheme of the Regulation. Compulsory winding up by the court in Ireland is listed in Annex A. The provisional liquidator, mentioned in the list in Annex C, was appointed in the context of such a proceeding. Those factors to my mind suffice.

88. I accordingly conclude on the first question referred that, 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, that order combined with the presentation of the petition constitutes a judgment

opening insolvency proceedings for the purposes of Article 16 of the Regulation.

The second question: the time of the opening of the proceedings

89. By its second question, which is put only if the first question is answered in the negative, the national court asks whether the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitutes 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 (18)) deeming the winding up of the company to commence at the date of the presentation of the petition.

90. Since in my view the national court's first question calls for a positive answer, it is unnecessary to answer the second question referred. However, if it arose, it could be dealt with briefly, along the following lines.

91. Dr Bondi and the Finnish, French, German and Italian Governments submit that the second question should be answered in the negative, while Bank of America, the Director of Corporate Enforcement, the Certificate/Note Holders, the Austrian, Czech and Irish Governments and the Commission consider that it should be answered in the affirmative. I agree with the latter view.

92. Article 16(1) of the Regulation, which concerns the recognition of judgments opening insolvency proceedings, requires recognition from the time a judgment 'becomes effective in the State of the opening of proceedings'. Thus it is national law which determines when the judgment becomes effective. That is consistent with Article 4 which provides that in general the law of the State where the proceedings are opened is the law 'applicable to insolvency proceedings and their effects' including the opening, conduct and closure of those proceedings. Recital 23 (19) makes it clear that that law includes procedural as well as substantive rules. I accordingly cannot accept Dr Bondi's assertion that the Regulation in some way 'overrides' domestic law provisions. It must also be borne in mind that the Regulation was not intended to be a harmonisation measure. (20)

93. Section 220(2) of the Irish Companies Act, 1963, provides that in the case of a compulsory winding up by the court (such as the proceedings at issue in the present case), the winding up 'shall be deemed to commence at the time of the presentation of the petition for the winding up'.

94. The terms of that provision, applicable by virtue of the Regulation, seem to me conclusively to resolve the national court's second question.

95. It might be added that, as the Certificate/Note Holders point out, the Virgós-Schmit Report explicitly recognises the existence of national 'relation back' doctrines, stating that the law of the State of opening of insolvency proceedings 'determines the conditions to be met, the manner in which the nullity and voidability function (automatically, *by allocating retrospective effects to the proceedings* or pursuant to an action taken by the liquidator, etc) and the legal consequences of nullity and voidability'. (21)

The third question: review of jurisdiction

96. By its third question the referring court asks whether, where insolvency proceedings are first opened by a court in the Member State in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, a court in another Member State has jurisdiction to open main insolvency proceedings.

97. That question will arise where, as in the present case, the courts of two Member States assert jurisdiction over the insolvency of a company. The Regulation makes no express provision for such a situation. The referring court asks essentially whether in such a situation the court in one of those Member States may review the jurisdiction of the court in the other Member State.

98. The referring court mentions Article 3(1), which states that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated are to have jurisdiction to open insolvency proceedings, and Article 16(1), which states that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction

pursuant to Article 3 is to be recognised in all the other Member States.

99. Bank of America, the Director of Corporate Enforcement, the Certificate/Note Holders and the Irish Government consider that foreign insolvency proceedings have to be recognised only if the foreign court objectively has jurisdiction; the third question should therefore be answered in the affirmative.

100. Those parties submit that the obligation on the courts of other Member States to recognise a judgment opening insolvency proceedings in a given Member State pursuant to Article 16(1) applies only if the Member State in which the insolvency proceedings are opened 'has jurisdiction pursuant to Article 3', and therefore only if the centre of the debtor's main interests is situated in that Member State. The courts of only one Member State have jurisdiction to open main insolvency proceedings and those are the courts of the Member State within whose territory the centre of a debtor's main interests is situated; it is quite clear from the Regulation that a company can have only one centre of main interests. The test as to where the centre of a debtor's main interests is situated is an objective one. A court of a Member State may not open main insolvency proceedings in respect of a corporate debtor where neither its registered office nor the place where it conducts the administration of its assets on a regular basis in a manner ascertainable by third parties is in that Member State. Thus, any court faced with the possibility that insolvency proceedings have been opened in another jurisdiction has to ascertain whether the other court did actually have jurisdiction pursuant to Article 3 and more particularly whether (a) the court claiming to have determined the locus of the centre of main interests applied the correct legal criteria and (b) the factual evidence is capable of supporting such a conclusion. Although recital 22 in the preamble to the Regulation requires that 'the decision of the first court to open proceedings should be recognised', it is notable that that requirement is not reflected in the main text of the Regulation.

101. Dr Bondi, the Austrian, Czech, Finnish, French, Hungarian and Italian Governments and the Commission submit that the national court's third question should be answered in the negative. I agree.

102. In my view, that conclusion follows in particular from the principle of mutual trust which underlies the Regulation and which is made explicit in recital 22 of the preamble. That recital states:

'Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.' (22)

103. Admittedly, the text of the Regulation does not include a provision to the same effect as recital 22. (23) However, the importance of the principle articulated in that recital is confirmed by the Virgós-Schmit Report, which states that the 'courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a Contracting State which claims jurisdiction under Article 3', and is accepted by numerous commentators. (24)

104. The proper remedy for any party to insolvency proceedings who is concerned that the court opening the main proceedings has wrongly assumed jurisdiction under Article 3 should be sought in the domestic legal order of the Member State where that court is situated, with the possibility of a reference to this Court if appropriate. (25)

105. I accordingly conclude in answer to the third question referred that, where insolvency proceedings are first opened by a court in the Member State in which a company's registered office is situated and in which the company conducts the administration of its interests 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.

The fourth question referred: the 'centre of a debtor's main interests'

106. By its fourth question the referring court asks for guidance on the governing factors in determining the 'centre of a debtor's main interests' within the meaning of Article 3(1) of the Regulation.

107. Article 3(1), it will be recalled, confers jurisdiction to open insolvency proceedings on the 'courts of the Member State within the territory of which the centre of a debtor's main interests is situated' and adds that 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'. That provision therefore establishes a rebuttable presumption. Recital 13 adds that the centre of main interests 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties'.

108. The fourth question is based on the situation where (i) the debtor is a subsidiary company, (ii) its registered office and that of its parent company are in two different Member States and (iii) 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 national court asks whether in those circumstances the presumption that the centre of the subsidiary's main interests is in the Member State of its registered office is rebutted if in addition 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.

109. Dr Bondi and the Italian Government consider that the latter circumstance is sufficient to rebut the presumption; Bank of America, the Director of Corporate Enforcement, the Certificate/Note Holders, the Austrian, Czech, Finnish, French, German, Hungarian and Irish Governments and the Commission take the contrary view.

110. I agree that the fact of the parent company's control is not sufficient to rebut the presumption in Article 3(1) of the Regulation that the centre of main interests of a subsidiary company is situated in the Member State where its registered office is to be found. That view seems to me to follow from the scheme and wording of the Regulation. Before further analysing the Regulation, however, I would like to respond to a number of arguments adduced by Dr Bondi and the Italian Government in support of the contrary view.

111. Those two parties rely principally on the Virgós-Schmit Report, which states: 'Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office'. (26) Dr Bondi and the Italian Government submit that if it is to be demonstrated that the centre of main interests is somewhere other than the State where a company's registered office is located, it consequently needs to be shown that the 'head office' type of functions are performed elsewhere. The focus must be on the head office functions rather than simply on the location of the head office because a 'head office' can be just as nominal as a registered office if head office functions are not carried out there. In transnational business the registered office is often chosen for tax or regulatory reasons and has no real connection with the place where head office functions are actually carried out. That is particularly so in the case of groups of companies, where the head office functions for the subsidiary are often carried out at the place where the head office functions of the parent of the group are carried out.

112. I find those submissions sensible and convincing. They do not, however, seem to me very helpful in answering the question. They do not in particular demonstrate that a parent company's control of a subsidiary's policy determines that subsidiary's 'centre of main interests' within the meaning of the Regulation.

113. Second, Dr Bondi submits that the 'ascertainability by third parties' of the centre of main interests is not central to the concept of the 'centre of main interests'. That can be seen from recital 13 itself, which states that the 'centre of main interests' 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis', in other words, in the case of a corporation, where its head office functions are exercised. Recital 13 continues 'and [which] is therefore ascertainable by third parties', in other words, it is *because* the corporation's head office functions are exercised in a particular Member State that the centre of main interests is ascertainable there.

114. Again, I agree with that analysis. It does not however seem to me to help, since the national court's fourth question assumes that the subsidiary 'conducts the administration of [its] interests on a regular basis' in the Member State where its registered office is situated.

115. Third, Dr Bondi submits that there is an important difference between 'ascertainable' and 'ascertained'. The question of ascertainability involves looking to see where the head office functions

are actually carried out: that is an objective process and should not be confused with subjective evidence from particular creditors about where they thought the centre of main interests was. To my mind, however, the distinction between 'ascertained' and 'ascertainable' is not relevant to the issues raised by the national court's fourth question, since both recital 13 and that question use the term 'ascertainable'.

116. Turning to the substance of the fourth question referred, I am of the view that, where the registered offices of a parent company and its subsidiary are in two different Member States, the fact (assumed by the referring court) 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 'centre of [its] main interests'.

117. It is clear that nothing can necessarily be inferred from the fact that a debtor company is a subsidiary of another company. The Regulation applies to individual companies and not to groups of companies; in particular it does not regulate the relationship of parent and subsidiary. Under the scheme of the Regulation, jurisdiction exists for each debtor with a separate legal entity. Both subsidiary and parent company have separate legal identities. It follows therefore that each subsidiary within a group must be considered individually. That is confirmed by Article 3(1), which provides that the place of the registered office of a company 'shall be presumed to be the centre of *its* main interests in the absence of proof to the contrary', and recital 13 in the preamble, which states that the centre of main interests 'should correspond to the place where the debtor conducts the administration of *his* interests'. (27)

118. Although that definition makes no reference to the elements which constitute 'administration', important in the present case where control of policy has been argued to constitute 'administration', it has been suggested that the choice of 'centre of main interests' (28) as the principal connecting factor determining the Member State with jurisdiction over an insolvent company is intended to provide a test in which the attributes of transparency and objective ascertainability are dominant. (29) Those concepts seem to me to be wholly appropriate elements for determining jurisdiction in the context of insolvency, where it is clearly essential that potential creditors should be able to ascertain in advance the legal system which would resolve any insolvency affecting their interests. It is particularly important, it seems to me, in cross-border debt transactions (such as those involved in the main proceedings) that the relevant jurisdiction for determining the rights and remedies of creditors is clear to investors at the time they make their investment.

119. Where a debtor company which is a 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', the conditions of transparency and ascertainability are by definition satisfied.

120. In contrast, the fact (also assumed in the national court's question) that a debtor company's 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' does not in my view satisfy those conditions.

121. The mere fact that one company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of a subsidiary, even if ascertainable by third parties, (30) does not demonstrate that it does in fact control that policy. If on the other hand a parent company does control the policy of its subsidiary, that fact may not be readily ascertainable by third parties. (31) The national court's question does not mention that the existence of control is so ascertainable.

122. That is not to say that the purely formal criterion of the locus of a subsidiary company's registered office will necessarily dictate the Member State whose courts have jurisdiction over any insolvency. An inherent aspect of the 'centre of main interests' concept is to ensure that functional realities are capable of displacing purely formal criteria. (32) Any party seeking to rebut the presumption that insolvency jurisdiction follows the registered office must however demonstrate that the elements relied on satisfy the requirements of transparency and ascertainability. Insolvency being a foreseeable risk, it is important that international jurisdiction (which entails the application of the insolvency laws of a given State) 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 insolvency to be calculated. (33)

123. It is significant in my view that in the present case the national court's question is based on the premiss that 'the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties'. That description satisfies the definition in recital 13. I consider that strong evidence of 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.

124. If therefore it were shown that the debtor's parent company so controlled its policies and that that situation was transparent and ascertainable at the relevant time (and not therefore merely retrospectively), the normal test might be displaced.

125. I would add finally that in determining the centre of a debtor's main interests, each case manifestly falls to be decided on its specific circumstances. For that reason it seems to me that the decisions of national courts referred to in the observations of various parties are not helpful in establishing rules of general application.

126. I accordingly conclude that, where the 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 centre of the subsidiary's main interests is in the Member State of its registered office is 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 and the fact of such control is not ascertainable by third parties.

The fifth question referred: public policy

127. The fifth question referred concerns Article 26 of the Regulation, which provides that a Member State may refuse to recognise 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'.

128. Specifically, the referring court asks whether, 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, that Member State is bound 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.

129. I would mention at the outset that if my analysis of the first question referred is correct, the fifth question does not in my view arise, since the Italian proceedings were opened after the Irish proceedings and therefore do not in any event require recognition (at least as main proceedings) under the Regulation.

130. Dr Bondi and the Italian Government are of the view that the fifth question should be answered in the affirmative, namely to the effect that in the circumstances outlined, the first Member State is bound to recognise the decision of the courts of the second Member State. Bank of America, the Director of Corporate Enforcement, the Certificate/Note Holders, the Czech, French, German, Hungarian and Irish Governments and the Commission essentially take the opposite view.

131. In my view it is clear, first, and as Dr Bondi and the Italian Government stress, that the public policy exemption in Article 26 is intended to be of limited scope. That is borne out by the inclusion in that provision of the requirement that the effects of recognition should be 'manifestly' contrary to public policy, by the statement in recital 22 in the preamble to the Regulation that 'grounds for non-recognition should be reduced to the minimum necessary', and by the Virgós-Schmit Report, which states: 'The public policy exception ought to operate only in exceptional cases'. (34)

132. Difficulties arise however when those parties – and indeed many of the parties presenting written observations on the fifth question – seek to apply the requirements of Article 26 to the facts of the present case.

133. In my view, given the wording of the fifth question referred, it is not open to the parties, or indeed to this Court, to depart from the factual assumptions which are woven into the terms in which the question is put.

134. That question explicitly assumes, where the courts of two Member States purport to open insolvency proceedings and where recognition of the decision of the court in Member State B is sought before the court in Member State A, (i) that it is manifestly contrary to the public policy of Member State A 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 and (ii) that the court of Member State A is satisfied that the decision of Member State B has been made in disregard of those principles.

135. It seems to me therefore that it is not relevant to debate the different legal cultures of the two Member States concerned or to seek to show that the provisional liquidator's legal rights were in fact safeguarded.

136. I also agree with Dr Bondi and the Italian Government that the Court's judgment in *Krombach* (35) 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.

137. That case concerned Article 27(1) of the Brussels Convention, which requires the courts of a Contracting State to refuse recognition of a judgment delivered by the courts of another Contracting State 'if such recognition is contrary to public policy in the State in which recognition is sought'. (36) The Court was essentially asked whether, where a court had refused to hear a defendant, recognition of that court's judgment could be refused under Article 27(1) solely on the ground that the defendant had not been present at the hearing.

138. The Court noted that Article 27(1) should be interpreted strictly, in that it constituted an obstacle to the attainment of one of the fundamental objectives of the Convention, and that recourse should be had to the public policy clause only in exceptional cases. (37) The Court continued:

'It follows that, while the Contracting States in principle remain free ... to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention.

Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.

...

It follows from a line of case-law developed by the Court ... that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question.' (38)

139. In the present case, the referring court states in its fifth question that, in the circumstances there outlined, permitting a decision so reached to have effect would be manifestly contrary to the public policy of the Member State concerned. It is apparent from the order for reference that that conclusion was reached after a thorough and searching review of the conduct of the Parma court by the Supreme Court of Ireland.

140. Dr Bondi and the Italian Government, citing the Virgós-Schmit Report, submit that the interpretation of public policy by the referring court as manifested in the fifth question is 'unreasonably wide' and 'not covered by Article 26'. (39)

141. While I agree with those parties that it follows from *Krombach* that the Court must review the limits of national public policy, I consider that their argument overlooks both the proper scope of that decision and the main thrust of the Virgós-Schmit Report.

142. In *Krombach*, the Court's statement that it was required to review the limits within which the courts of a Contracting State may have recourse to the concept of public policy for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State (40) was immediately followed by a reference to 'the general principle of Community law that everyone is entitled to fair legal process', inspired by the fundamental rights which form an integral part of the general principles of law whose observance the Court ensures and which are enshrined in the European Convention on Human Rights. (41) The significance of those fundamental rights permeates the Court's judgment. (42) In that light I consider that the requirement of due process in principle falls within the scope of the public policy exception under Article 26 of the Regulation.

143. The Virgós-Schmit Report seeks to restrict interpretations of public policy to constitutionally protected rights and freedoms and fundamental policies of the requested State of both substance and procedure; indeed it states that public policy may 'protect participants or persons concerned by the proceedings against failures to observe due process. Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings'. Creditors whose participation is hindered are expressly mentioned. (43)

144. The requirement of due process may be regarded as particularly important given that the Regulation does not permit review of the substance of a decision of which recognition is sought. (44)

145. The public policy referred to in Article 26 of the Regulation thus in my view clearly does encompass failures to observe due process where essential procedural guarantees such as the right to be heard and the rights of participation in the proceedings have not been adequately protected. Provided that the conduct which is alleged to infringe public policy falls in principle within the scope of that provision, its terms make it clear that it is for each Member State to evaluate whether the judgment of another Member State offends the first Member State's public policy. If so, the question whether the infringement alleged has been sufficiently grave to warrant that court's refusing recognition on the basis of Article 26 is a matter for its national law. (45)

146. Dr Bondi and the Italian Government further submit that Article 26 applies only where the 'effects' of the proposed recognition would be 'manifestly contrary' to the State's public policy. The 'effect' in the present case is that the Irish courts are obliged to recognise that their own insolvency proceedings are 'secondary' and not 'main' proceedings. Those parties contend that it is difficult to see why such a limited 'effect' should be manifestly contrary to Irish public policy.

147. Again however that argument seems to me to disregard the terms in which the question is put. The national court expressly states that it is manifestly contrary to the public policy of the Member State concerned 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, and that it is satisfied that the decision in question has been made in disregard of those principles.

148. Finally, Dr Bondi and the Italian Government submit that the referring court appears to have failed to appreciate that, even if a case were to come within Article 26, the Member State whose public policy is involved does not have to refuse recognition. The word 'may' is used in Article 26, allowing the Member State a discretion whether to refuse recognition. That contrasts with the use of the word 'shall' in Article 27 of the Brussels Convention. If – as those parties assert – in substance Mr Farrell obtained a fair hearing in Italy, and given that, if not, he could have sought to redress the alleged procedural deficiencies by an appeal, the referring court should not undermine the system of recognition in the Regulation by exercising its discretion to refuse recognition.

149. Again, however, the first point raised above, namely the alleged fairness of the hearing, seems to me to seek to reopen the facts found by the referring court, which states in the question referred that it is satisfied that the decision of the Parma court was 'made in disregard [of the] right to fair procedures and a fair hearing'.

150. With regard to the second point, namely the possibility of redress by appeal, it must be borne

in mind that at the early stages of insolvency proceedings time will frequently be of the essence, so that a given procedure must be assessed as it stands. That approach is consistent with the comments in the Virgós-Schmit Report dealing with the similarly urgent context of ex parte preservation measures. The Report notes that all the Contracting States provide for such measures, and continues: 'Naturally, for these measures to be constitutional, in most States they are subject to special requirements guaranteeing a respect of due process (e.g. cumulatively, evidence of a good prima facie case, serious urgency, lodging of a guarantee by the applicant, immediate notification of the person concerned and the real possibility of challenging the adoption of the measures)'. (46) The requirement that those conditions be cumulative suggests that failure to observe one, such as immediate notification of the person concerned, may not necessarily be cured by the existence of another, such as the possibility of challenge. (47) The Report stresses that whether such measures are recognised 'depends on whether or not they are compatible with the public policy of the requested State in which the judgment is to take effect'. (48)

151. Finally with regard to the wording of Article 26, it is correct that that provision, in contrast to Article 27(1) of the Brussels Convention, confers a discretion on the court before which recognition is sought. The fact that that court has the option of recognising insolvency proceedings opened in another Member State even where the effect of such recognition would be manifestly contrary to its public policy cannot however mean that that will always be the correct course, since that interpretation would deprive Article 26 of any effect. In the present case it seems to me 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 nothing to suggest that that court incorrectly exercised its discretion by refusing recognition.

Conclusion

152. I accordingly conclude that the first, third, fourth and fifth questions referred by the Supreme Court of Ireland should be answered as follows:

(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, that order combined with the presentation of the petition constitutes a judgment opening insolvency proceedings for the purposes of Article 16 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

(2) Where insolvency proceedings are first opened by a court in the Member State in which a company's registered office is situated and in which the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, the courts of other Member States do not have jurisdiction under Article 3(1) of Regulation No 1346/2000 to open main insolvency proceedings.

(3) 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 in Article 3(1) of Regulation No 1346/2000 that the centre of the subsidiary's main interests is in the Member State of its registered office is 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 and the fact of such control is not ascertainable by third parties.

(4) 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, that Member State is not bound by Article 16 of Regulation No 1346/2000 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.

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1 – Original language: English.

2 - Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

3 - The background is described in the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-1/04 *Staubitz-Schreiber*, delivered on 6 September 2005. See also M. Balz, 'The European Union Convention on insolvency proceedings', *American Bankruptcy Law Journal* 1996, p. 485, at 529; I. Fletcher, *Insolvency in Private International Law* (1999) ('Fletcher'), pp. 298-301, and P. Burbidge, 'Cross border insolvency within the European Union: dawn of a new era', *European Law Review* 2002, p. 589, at 591.

4 - The differences are described and explained in paragraphs 1.22 and 1.23 of G. Moss, I. Fletcher and S. Isaacs, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2002) ('Moss, Fletcher and Isaacs'). See also M. Virgós and F. Garcimartín, *The European Insolvency Regulation: Law and Practice* (2004) ('Virgós and Garcimartín'), point 48(a).

5 - The Virgós-Schmit Report, which was the source of many of the recitals in the preamble to the regulation, was never published in the Official Journal, although it exists as a document of the Council of the EU of 8 July 1996 - 6500/1/96. The final version of the full text in English may however be found in Moss, Fletcher and Isaacs. See also the article by M. Balz cited in footnote 3 ('Balz'). Mr Balz chaired the working party of the EU Council Group on Bankruptcy which authored the Convention. He states that the Virgós-Schmit Report was 'discussed extensively and agreed to by the expert delegates but, unlike the Convention, was not formally approved by the Council of Ministers. Nevertheless, it will have considerable authority for courts in Member States' (footnote 51).

6 - Similarly the Court has on countless occasions referred to the explanatory reports on the Brussels Convention (principally the Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1979 C 59, p. 1) and the Schlosser Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71)).

7 - Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999 (OJ 1999 C 221, p. 8).

8 - Article 1(1).

9 - See further point 117 below.

10 - Since the facts giving rise to the main proceedings, the annexes to the Regulation have been amended by Council Regulation (EC) No 603/2005 of 12 April 2005 (OJ 2005 L 100, p. 1); the amendments are not material to the present case. See further footnote 14.

11 - The Office of the Director of Corporate Enforcement was established in November 2001 pursuant to the Company Law Enforcement Act, 2001. Under that Act, the Director of Corporate Enforcement is responsible for encouraging compliance with company law and investigating and enforcing suspected breaches of the legislation.

12 - See also the Virgós-Schmit Report, which states: 'All the proceedings listed in Annex A have two ultimate consequences: the total or partial divestment of the debtor and the appointment of a liquidator. However, distortions would arise if the Convention were to apply only from the time when these consequences occur. The initial stages of insolvency proceedings could be excluded from the Convention's system of international cooperation. These consequences are necessary for proceedings to appear in the lists in Annex A. However, once the proceedings have been included, it is sufficient to open proceedings in order that the Convention should apply from the outset' (point 50). Balz also states: 'There is no requirement that all elements of insolvency proceedings be present at the moment of opening. For instance, if a liquidator is generally appointed after the opening of proceedings, the Convention applies to such proceedings from their inception' (p. 501).

13 - See point 15 above.

14 - It may be noted that one UK commentator implicitly took this view in the context of the Convention when discussing the consequences of the appointment of a provisional liquidator in the UK. At that time, the list in Annex C did not include a provisional liquidator for the UK (that has since been changed by Regulation No 603/2005, cited in footnote 10). Fletcher states, in relation to the definition in Article 2(f), 'Thus, a judgment opening insolvency proceedings can have extraterritorial effects even if it is not a final judgment, provided that its effects have not been stayed by the court which granted it. This might lead one to suppose that an appointment of a provisional liquidator by a court in the United Kingdom could be considered to carry such consequences. However, it must be borne in mind that recognition under Article 16 is only accorded to insolvency proceedings within the scope of the Convention, and expressly listed in the Annexes thereto. Since a provisional liquidator is not included among the types of office holder listed in Annex C, the automatic recognition of such an appointment is precluded' (pp. 283 and 284).

15 - Article 38, it may be noted, is in Chapter III of the Regulation, headed 'Secondary insolvency proceedings'.

16 - It appears that as a matter of Irish law a company may in certain circumstances be compulsorily wound up by the court even where it is not insolvent.

17 - Virgós and Garcimartín, point 36; see also the Virgós-Schmit Report, points 49 and 50; Moss, Fletcher and Isaacs, points 3.02 and 8.07; Balz, p. 502. The situation is slightly different for the condition of insolvency, since in circumstances where the type of proceeding listed in Annex A may be used both where there is insolvency and where there is not, the insolvency condition must in addition be satisfied. In the present case, however, that is not in my view an issue: see point 81 above.

18 - Set out in point 22 above.

19 - Set out in point 10 above.

20 - See point 77 above.

21 - Point 135, emphasis added.

22 - Unless the public policy exception in Article 26 is invoked. Article 26 is the subject of the referring court's fifth question in the present case.

23 - That is in part for historic reasons. Virgós and Garcimartín explain that when negotiating the transformation of the Convention into a regulation, the Member States decided to incorporate in the preamble those aspects of the Virgós-Schmit Report which were considered especially relevant for the purposes of ensuring the correct understanding of its rules (point 48(a)).

24 - Virgós-Schmit Report, point 202(2); see also points 79, 215 and 220; Moss, Fletcher and Isaacs, points 5.38, 8.47, 8.48 and 8.205; Virgós and Garcimartín, points 70 and 402; Balz, pp. 505 and 513, and Fletcher, p. 288.

25 - See the Virgós-Schmit Report, point 202, and Fletcher, pp. 288-9.

26 - Point 75. Balz puts it in somewhat different terms: 'In the case of a mere mailbox registration, the headquarters will be treated as the centre of main interests' (p. 504).

27 - Emphasis added. See also the Virgós-Schmit Report, point 76, Virgós and Garcimartín, point 61, and Balz, p. 503.

28 - See for an interesting account of the background to the concept of the 'centre of main interests' Virgós and Garcimartín, point 46.

29 - Virgós-Schmit Report, point 75; Moss, Fletcher and Isaacs, point 3.10, and Virgós and Garcimartín, point 53.

30 - There are various requirements, stemming from EC legislation, concerning disclosure by companies of both the procedure for appointing directors and the existence of a parent-subsidiary relationship. However, not all those requirements apply to all companies: the position varies depending on whether the companies concerned are public or private, and in the case of public companies, on whether they are listed. Moreover disclosure in a company's published accounts is inevitably retrospective: since accounts are of necessity prepared and published after the period to which they relate, they will not assist potential creditors of a company in determining the actual and prospective locus of the centre of that company's main interests.

31 - It is perhaps for this reason that Virgós and Garcimartín take the view that 'in the case of subsidiary companies the relevant connection will be the place where the centre of administration (i.e. head office) of the subsidiary company is located. The fact that the decisions of this subsidiary are taken in accordance with instructions emanating from the parent company or from shareholders living elsewhere does not modify the rule of international jurisdiction over this company' (point 51). See also Virgós and Garcimartín, point 61.

32 - Moss, Fletcher and Isaacs, point 3.11.

33 - Virgós-Schmit Report, point 75.

34 - Point 204.

35 - Case C-7/98 [2000] ECR 1-1935; see further point 138 below. See also Case C-38/98 *Renault* [2000] ECR I-2973.

36 - The equivalent provision in Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), is Article 34(1); that provision differs from Article 27(1) of the Convention however in that, like Article 26 of the Insolvency Proceedings Regulation, recognition of a judgment must be 'manifestly contrary to public policy' before it can be refused on that ground.

37 - Paragraph 21.

38 - Paragraphs 22, 23 and 42.

39 - Point 205.

40 - Paragraph 23, set out in point 138 above.

41 - Paragraphs 25 to 27.

42 - See in particular paragraphs 38, 39 and 42 to 44.

43 - Point 206.

44 - See Virgós and Garcimartín, point 406.

45 - Virgós-Schmit Report, point 207.

46 - Point 207.

47 - It may be noted that the referring court states in the order for reference that that is indeed the case as a matter of Irish law: 'In a like situation, this court would not allow a corresponding decision of any court or administrative body under its jurisdiction to stand. It would consider the want of fair procedures in itself as so manifestly contrary to public policy that it would regard it as having been made without jurisdiction and, consequently, void. Nor would that result be cured by the fact that the decision could be reopened before the same court. Such a fundamental failure to observe fair procedures would taint the entire proceeding.'

48 - Point 207.