Eurofood IFSC Ltd
Irish Supreme Court: *Re Eurofood IFSC* [2004] IESC 45, [2004] 4 IR 395 (27th July 2004) See also ECJ Case C-341/04 [2006] ECR I- 3813 (2nd May 2006)
EU: Irish Finco within a multinational group of companies
Court of Justice of the European Union by Reference from the Irish Supreme Court on a question of interpretation under the EIR 1346/2000

Key Words
Recognition; commencement of insolvency processes; administrative authority or court; procedural issues which are dissimilar; procedural issues and the public policy exception/exemption; provision of key information.

Summary of Facts of the Case
The *Eurofood* case is one of the many cases occurring under the collapse of the Parmalat corporate empire in late 2003. The Parmalat case was mired in charges of financial fraud, leading to the arrest of several of its principal managers in Italy, with further associated charges spanning the globe. Beginning with an insolvency filing in Parma in relation to Parmalat SpA, the Irish subsidiary, Eurofood, followed suit with proceedings filed in both Ireland and Italy, leading to the international venue conflicts that were created in Eurofood (Bufford 438-439). Eurofood IFSC was a company registered in Ireland but was also a wholly owned subsidiary of the Parmalat SPA group (incorporated in Italy). The function of Eurofood was to provide the financing facilities for companies in the Parmalat Group [para 17]. On 24 December 2003, Parmalat spa was admitted to extraordinary administration by the Italian Ministry of Production Activities, who appointed Mr Bondi as the 'extraordinary administrator' [para 18] under the Italian *amministrazione straordinaria* procedure (contained in Annex A of the EIR and its Recast). In Ireland, a petition for winding up Eurofood was presented by the Bank of America to the High Court resulting in a *provisional* liquidator being appointed on 27 January 2004 [para 19] with powers to take possession of all of the company's assets and to manage its affairs [para 20]. A winding up order was made against Eurofood with an *official* liquidator appointed on 23 March. In the meantime, insolvency proceedings were commenced on 9 February 2004 by the Italian Minister for Production Activities [para 21]. The question turned on which proceedings would prevail in relation to Eurofood IFSC based on which step constituted the 'opening of proceedings' under the terms of the EIR 2000.

This project (no. 800807) is funded by the European Union's Justice Programme (2014-2020).

This issue was contested by the Italian authorities, which characterised a provisional liquidator as a 'temporary administrator' with 'limited powers' and therefore not a 'liquidator' for the purpose of the EIR. The Italian extraordinary administrator, who had been represented in the High Court hearings, appealed to the Supreme Court, which in turn referred the matter to the ECJ. The ECJ held that Eurofood's COMI coincided with its place of registration in conformity with a straightforward reading of Article 3 of the Regulation. The ECJ held that the presumption in Article 3 could not be rebutted simply by evidence of some parental contact where the parent company was located in another Member State. Furthermore, once jurisdiction had been determined in this manner, the obligations to recognise the judgements of the court of a Member State were triggered.

As summarised by Bufford, the questions in this case surrounded:

- Jurisdiction to open main proceedings, which the Irish Court claimed the Italian court in Parma lacked;
- Whether the circumstances of the conduct of proceedings in Italy justified the refusal of the Irish courts to recognise a decision of that court under public policy exceptions [para 23];
- In relation to the public policy question, whether the Parma court had also violated the International Convention on Civil Rights and the European Convention on Human Rights in respect of a party's right to fair procedures and a fair hearing by failing to provide the provisional liquidator in Ireland with copies of essential papers upon which the application was grounded [para 24(5)].

Samuel L Bufford, 'International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429.

Richard Sheldon (ed), Cross-Border Insolvency (3rd edn, Bloomsbury Professional 2011) paras 2.37-2.118)

Cooperation and/ or Coordination Issue(s)

This decision was a key decision in the development of COMI principles. As noted by Bufford, 'the decision on which country will handle a main international insolvency proceeding determines which country's substantive and procedural law will govern the proceeding', which will also have a potentially significant impact on the rights and outcomes for creditors (Bufford 432).

The importance of this decision is that it recognised the availability of different processes in different Member States but also that recognition of the opening of insolvency proceedings was required by the Insolvency Regulation and that therefore, in relation to Eurofood IFSC, the Irish winding up process prevailed.

Further detail on the timing aspects of this issue were addressed by Advocate General Jacobs in his opinion wherein it was stated that it is national law that determines when a 'judgment' becomes effective. The ECJ has subsequently held in the *Staubitz-Schreiber* Case C-1/04 [2006] ECR I-701 that the lodging of a request for the opening of proceedings in a Member State has, at least, the effect of restricting the debtor's freedom to move its centre of main interests, and thus the Member State where the request is lodged retains jurisdiction to determine the issue of centre of main interests and whether to open main insolvency proceedings.

In addition to the main arguments, the 'public policy exception' was also claimed as a reason for refusing to recognise the Italian proceedings. This refusal was based on 'the circumstances in which the proceedings were conducted before the District Court of Parma', specifically, that the creditors

of Eurofood IFSC and the liquidator were not given the opportunity to be heard in that court [para 23]. This important 5th question set before the ECJ revolved around the public policy exception, relating to the allegation that the right to a fair procedure and fair hearing had not been respected in the Italian case due to a failure to notify creditors, but also including the failure to provide copies of essential papers grounding the application.

In Italy, proceedings were brought by an 'administrative authority' rather than a court, and this was a source of difficulty for the parties based in Ireland. Similarly, there is evidence that the title 'provisional' in relation to the liquidator was also misleading to the Italian parties.

The procedural issues linked to the public policy exception is also an important argument.

Finally, the issue of mutual trust is addressed where the ECJ also confirmed that this principle requires the courts of other Member States to recognise the decision of the Member State in which main insolvency proceedings were opened, **without the ability to review that Member State's assessment of jurisdiction under the Regulation**. However, interested parties are entitled to challenge the decision to open main proceedings under the national procedural law of the Member State concerned. This issue is expanded upon in *MG Probud Gdynia sp zoo* Case C-444/07.

Samuel L Bufford, 'International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429.

Resolution

The ECJ held that it was the appointment of the provisional liquidator by the Irish High Court on 27 January 2004, which constituted the opening of main insolvency proceedings. Under Irish law a provisional liquidator has 'extensive powers', including to take possession of the assets of a company, and his role is therefore much wider than a 'temporary administrator.'

In his opinion in *Eurofood*, Advocate General Jacobs explained that 'in various jurisdictions there are different ways in which insolvency proceedings may be commenced', usually a decision of a court, on the one hand, and the appointment of a liquidator, on the other hand. The EIR 'confers automatic recognition on insolvency proceedings opened in both ways'

Applicability to Preventive Restructuring

This case turned on the issue of recognition of the opening of proceedings. As long as the frameworks are contained in Annex A, the process commenced first in time should be automatically recognised by all other jurisdictions. However, if there are differences between the proceedings that fall within grey areas in the EIR Recast, there could be similarly problematic conflicts. Grey areas, such as those discussed in *Eurofood* concerned the definition of the insolvency proceedings that must be recognised, the point in time when these proceedings are opened and the procedural aspects of such proceedings, could all still be used as a means to attempt to deny recognition. The EIR Recast also provides for a public policy exception in Article 33, however, which could similarly provide an argument should one jurisdiction be uncomfortable with the procedure of another, particularly if it is a group company a division of which could rely on Article 63(1)(b) as described below.

Applicability of Rules under the EIR Recast and Cooperation Guidelines

Rules of Recognition

The rules on recognition under the EIR Recast are automatic pursuant to Article 19. Therefore, if a procedure is contained in Annex A, a court should defer to the jurisdiction's procedure that began first in time. In addition, the professionals tasked with administering procedures under the EIR Recast are now referred to generally as insolvency practitioners, which is a shift from the original EIR, which referred to liquidators. EIR Recast Article 2(5) also defines insolvency practitioner to include a description of duties that, were *Eurofood* to be heard today, would likely extend to the role of Mr Bondi. The fact that he was an 'administrative authority' should not be determinative today, particularly given that his role as *commissario straordinario* is included in Annex C of the EIR Recast.

Public Policy Exception

The public policy exception remains within the EIR Recast in Article 33. Therefore, it can be argued that recognition should not occur where this is manifestly contrary to the public policy of that Member State.

Provision of Key Information and Documents

One interesting aspect of the public policy issue in the *Eurofood* case was the complaint that essential papers were not provided to the Irish court by the Italian administrator. The provision of information is a key aspect of many of the cooperation guidelines. For example, Guideline 7 of the CoCo Guidelines specifies that the disclosure of information should extend to 'all relevant information about the existence and status of the insolvency proceedings in which they have been appointed'. Although the sharing of information is applicable across most guidelines to ensure that there is full consent among the parties (see for example Guideline 3 of the JudgeCo Principles), this should not prevent the full disclosure and sharing of information when its provision would assist in cooperation and the resolution of a case.

Groups of Companies

Chapter V of the EIR Recast, which was not in force at the time of *Eurofood*, is also worth mentioning in this context. Article 61 enables a company to request the opening of coordinated group proceedings before any court with jurisdiction over the insolvency proceedings of a member of the group. The granting of such a petition is contingent on a number of factors, one of which is that any creditor expected to participate in the proceedings will not be financially disadvantaged by its participation (Article 63(1)(b)). Presumably this would have been one of the concerns held by Bank of America had Eurofood IFSC been wound up in Italy and not Ireland, in addition to the logic that an Irish company's insolvency proceedings should be conducted in an Irish court (Bufford 441).

If coordinated group proceedings had been used in this kind of case, arguably it would have led to more efficiency and less cost for the parties involved, as the cost of cooperation obligations are borne by participants in such proceedings. With that said, the liquidator acting for Eurofood IFSC may have opted to object to being included in any such proceeding by virtue of Article 64 of the Recast.

Samuel L Bufford, 'International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429