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OPINION OF ADVOCATE GENERAL

JACOBS

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 insolvency 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 main insolvency 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 Regulation 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.

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 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.

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

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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.

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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).

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13 – See point 15 above.

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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).

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

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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.

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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.

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18 – Set out in point 22 above.

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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.

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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.

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32 – Moss, Fletcher and Isaacs, point 3.11.

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33 – Virgós-Schmit Report, point 75.

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34 – Point 204.

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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.

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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.

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37 – Paragraph 21.

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38 – Paragraphs 22, 23 and 42.

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39 – Point 205.

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

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41 – Paragraphs 25 to 27.

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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.