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Law . Tax

# CMS Guide to Finding COMI

European cases

June 2013

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# Introduction

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We are delighted to present this CMS report which provides an overview of the interpretation by courts in 12 jurisdictions of the 'centre of main interest' (COMI). The EC Insolvency Regulation<sup>1</sup> (EIR) stipulates which national law is applicable if insolvency proceedings are opened in a relevant EU jurisdiction. The drafting of Article 3 para 1 of the EIR is such that, under certain circumstances, it allows for the possibility of choosing the national insolvency law that will apply by changing the COMI of a subject debtor. This is also referred to as forum shopping.

Which national law is applicable can be critical in determining the opportunities to deploy a variety of corporate restructuring methodologies. The interpretations of Article 3 para 1 by national courts differ in the various CMS jurisdictions, in some cases significantly.

During the CMS Restructuring & Insolvency Associates Training, which took place in 2012 in Brussels, the main topic was to identify and compare the interpretation of the COMI in different European countries. This report provides an overview of interpretations in 12 jurisdictions!

In the first part of this report a general introduction is given on forum shopping and the EIR with focus on the interpretation of the European Court of Justice (ECJ) with respect to the COMI principle.

Throughout this report we seek to draw your attention to the varied incidences of forum shopping opportunities that may arise and the complications this may cause. If you have any questions arising out of any of the issues contained in this report, please contact us.

CMS Practice Group for Restructuring & Insolvency

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<sup>1</sup> Council Regulation (EC) No.1346/2000 on insolvency proceedings.

○ CMS offices

◀ Rio de Janeiro

Dubai ▶

Beijing ▶

Shanghai ▶



# About CMS

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## CMS at a glance

With more than 5,000 people working in 54 offices across 29 countries, CMS has the most extensive European footprint of any legal and tax services provider. Our breadth across Europe is supported by our depth in terms of legal, industry and local expertise.

Based on our combined revenues, we are one of the top 5 legal providers in Europe. We also rate at or near the top of the list when measured by the number of jurisdictions where we operate, our number of offices and number of lawyers.

CMS maintains strong, trusted relationships with many of the world's leading businesses. We act for more than a quarter of the FT European 500 and for a number of Fortune 500 companies.

In terms of quality, CMS has a strong presence in leading directories, including 94 Band 1 rankings and 179 Band 2 rankings in Chambers 2012 and Legal 500 2012.

## Facts & figures

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Established	July 1999
Turnover 2011	EUR 808 m
Partners	> 750
Fee earners	> 2,800
Total staff	> 5,000
Offices	54

## Practice Area lawyer numbers (approx.)

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Corporate	700
Tax	360
Banking & Finance	500
Commercial	350
Competition	140
Dispute Resolution	420
Employment	210
Intellectual Property	160
Real Estate & Construction	250

CMS brings together ten European-headquartered law firms. We have chosen a single organisational structure that suits clients doing business in Europe. Each CMS office is tailored to its local market, ensuring that clients benefit from personal service and market sensitivities, while working together under a shared mission and governance structure.

## The CMS Practice Group for Restructuring and Insolvency

Representing all the restructuring and insolvency teams of the various CMS jurisdictions, the restructuring and insolvency practice group has a long history of association and commands strong positions, both locally and on the international market. The group was created in order to meet the growing demand for integrated, multi-jurisdictional legal services in this field.

Members of the Practice Group advise on specialized restructuring and insolvency issues affecting business across Europe.

Restructuring & Insolvency issues can be particularly complex and there is a wide range of different laws and regulations affecting them. The integration of our firms across Europe means we can provide coordinated European advice through a single point of contact. Contact details are set out at the end of this guide.

The information contained in this guide is of a general nature and is not intended to be a full legal review of the topics covered and cannot be relied upon for specific advice. We accept no responsibility for any acts or omissions as a result of the information contained in this guide. If you would like to receive specific legal advice, please contact your usual CMS attorney.

The information in this guide is accurate as at December 2012 but please keep in mind that this is a developing area.

# EC Insolvency Regulation and Forum Shopping

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## Forum shopping

Forum shopping is a popular issue today, where big corporations operate in more than one country and technology enables parallel engagement in numerous places and, more generally, there has been a global convergence of economies and legal systems. Particularly within the European Union, the close legal and economic connections between the Member States in the internal market allow the migration of both legal and natural persons in search of the most favourable legal framework.

In its broadest meaning, forum shopping provides a claimant with the choice of bringing an action in more than one jurisdiction. The choice of jurisdiction in which to bring the action will be based upon the route most likely to result in the best possible solution. From an insolvency perspective, the parties focus on finding the optimal legal system for restructuring a company or managing its insolvency.

Forum shopping may be motivated by various factors including both substantive law issues and practical procedural reasons, such as the promptness of proceedings or costs. The main reason for forum shopping in the area of insolvency law is the search for a restructuring mechanism or insolvency outcome unavailable (or more cumbersome) under the national laws of a country.

Para 4 of the preamble to the EIR states that it is necessary to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. It is clear that the EIR both identifies and explicitly seeks to prevent forum shopping. In practice, it has become evident that it is possible to shift COMI (whether by moving the registered office or the central and financial administration of a company or both) in order to benefit from more favourable bankruptcy or reorganisation processes.

## EC Insolvency Regulation

The introduction of the EIR in May 2002 was intended to achieve a level of harmonization in relation to insolvencies across EU Member States (except Denmark which opted not to participate). Given the rise in cross border transactions, the pre-amble outlines the need for coordination of the measures to be taken with regard to an insolvent debtor's assets within the EU.

However, the EIR also recognizes the differing substantive laws across the EU and the impracticality of attempting to formulate a code of insolvency law applicable throughout every Member State. The EIR therefore only provides rules on significant aspects of cross border insolvencies and focuses on process rather than substantive law. These include which Member State's courts have jurisdiction to open insolvency proceedings, the choice of law applicable to such proceedings, and recognition across the EU of the effects of judgments by a court in a Member State having jurisdiction.

## To whom does the EC Insolvency Regulation apply?

The EIR applies to a debtor (who can be either a physical or legal person) having its COMI within a Member State of the EU. Credit institutions and insurance companies are excluded from the scope of the EIR and are regulated by separate directives.

Perhaps surprisingly, as COMI is one of the cornerstones of the EIR, the EIR itself does not contain a definition of the term. The pre-amble, which serves as an aid to interpretation, but which is not legally binding, provides that COMI 'should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'. In the case of a company, the place of the registered office is presumed to be the COMI in the absence of proof to the contrary.

Determining the COMI is often a problem when it comes to group companies. The EIR however does not provide specific rules for group companies with subsidiaries in different countries. Some commentators plead for an expansion of the COMI principle to enable all group members to enjoy the same COMI. This creates a number of difficulties. Firstly the COMI of individual group members would not always be ascertainable by third parties. This would be a radical departure from the fundamental principles of the EIR. Secondly it would multiply many times over the possibility of jurisdictional arguments over the effectiveness of COMI shift. The judges of different states would have an increasing opportunity to declare themselves competent to take jurisdiction over broad swathes of companies clearly otherwise marked out as companies 'belonging' to other jurisdictions. Finally such an expansion would almost certainly increase the attraction of attempting COMI shifts ahead of opening insolvency proceedings.

### **To what proceedings does the EC Insolvency Regulation apply?**

The EIR applies to all 'collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'. The different national procedures are listed in Annex A of the EIR. A 'liquidator' is defined as a person whose function it is to administer or liquidate assets of which a debtor has been divested or to supervise the administration of his affairs.

#### **Jurisdiction: main proceedings**

Primary jurisdiction is accorded to the courts of the Member State within which the COMI of the debtor is located. Subject to any secondary proceedings (see below) and any relevant exceptions, insolvency proceedings opened in the Member State where the debtor's COMI is located are called 'main proceedings' and they are deemed to be of universal scope encompassing all the debtor's assets on a worldwide basis.

Subject only to certain entrenched rights (see below), the law of the Member State in which the proceedings are opened determines the conditions for the opening of those proceedings, their conduct and their closure. Art. 4 sub 2 EIR lists, not exhaustively, those matters that are governed by the law of that Member State. They include, for example, the respective powers of the debtor and the office-holder, the effects of the insolvency proceedings on current contracts to which the debtor is party and the rules governing the lodging, verification and admission of claims.

#### **Jurisdiction: secondary proceedings**

The courts of other Member States have jurisdiction to open secondary insolvency proceedings against a debtor possessing an 'establishment' within the territory of that other Member State. The term establishment is defined as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'.

#### **Primacy of main proceedings**

Secondary proceedings are limited to the assets of the debtor situated in the territory of the Member State in which proceedings are commenced and may only be 'winding up proceedings'. Various provisions of the EIR ensure the primacy of the main proceedings, including a requirement on the liquidator of the secondary proceedings to co-operate with the liquidator of the main proceedings.

### **Recognition**

A judgment handed down in the main proceedings will, subject to limited exceptions based on public policy, be recognized and given effect in other Member States with no further formalities. In addition, the effects of any judgment handed down in secondary proceedings may not be challenged in other Member States.

The liquidator appointed in the main proceedings will be entitled to exercise all the powers conferred on him by the law of the Member State of the main proceedings in another Member State, provided no secondary proceedings have been opened in that other Member State nor any preservation measures to the contrary have been taken there.

#### **Entrenched rights**

Certain creditors' rights are excluded from the general choice of law rule in the EIR and are given entrenched status. Rights in rem (including security rights of a proprietary nature) are one example. So if a debtor has its COMI and main proceedings in for instance France, in general the EIR dictates that its insolvency and assets (wherever they are) are dealt with according to French insolvency law. But if it has a creditor with a proprietary claim relating to an asset situated in for instance Germany, the law applicable to the proprietary claim remains German law. Other entrenched rights include reservation of title claims, set-off and contracts relating to immoveable property.

#### **COMI**

Since the coming into force of the EIR, a large body of jurisprudence has sprung up dealing with the interpretation of Art. 3 para 1 of the EIR. This is true at both the national level in several European countries as well as under the auspices of the European Court of Justice (ECJ). The following brief summaries highlight some of the issues the ECJ has been asked to consider.

#### ***Eurofood, 02-05-2006, C-341/04***

Eurofood was an Irish financing company of the (Italian) Parmalat Group. The Irish court appointed a provisional liquidator. Shortly after, an Italian judge opened main proceedings in Italy. It was considered in this case that the sole fact that the control over the economic choices of the debtor were made by the mother company in another member state, is not sufficient for rebutting the presumption given in Art. 3 sub 1. A decision of a judge in a member state concerning the COMI must be respected by judges in another member state; they cannot examine this judgment.

*Interedil, 20-10-2011, C-396/009*

This case concerned a COMI shift. An Italian company moved to England and was registered there. The court decided that when the place of the central board of a company is not at the place of its registered office, the existence of assets and agreements regarding these assets in another member state other than the state of its registered office, can only lead to a rebutting of the presumption when, from a complete assessment of all the relevant factors, in a way that it is ascertainable by third parties, it becomes clear that the actual centre of management and control is in that other member state.

*Rastelli, 15-12-2011, C-191/10*

Insolvency proceedings were opened in France. The French judge extended the procedure to Rastelli, an Italian company. The court ruled that the judicial authority in a member state that opened the main proceedings by deciding that the company's COMI is in that state, can only expand this judgment to another company if this company also has its COMI in that member state. Furthermore, a decision which will have the same consequences as a decision to open main proceedings can only be taken

by the judicial authorities in a member state when they are competent to open main proceedings.

**Problems with the EC Insolvency Regulation**

The practical application of the EIR across the Member States since its introduction in 2002 has not always been smooth. There have been instances of 'forum shopping' and jurisdictional conflicts, which the Regulation set out to avoid. However, it is hoped that these problems will reduce (or at least outcomes become more predictable) as the EIR case law and practice develops. Notwithstanding these problems, the EIR represents progress towards co-operation and coordination in the field of international insolvency, for the benefit of insolvent businesses and their creditors alike.

Proposals for an amendment to the EIR have been issued by a working group of INSOL Europe. An important proposed amendment is to take up a so called 'look back period': if the COMI has changed in the year before filing for insolvency, the creditors have to give their approval for the opening of proceedings. Since these are only just proposals it is unlikely that amendments to the EIR with regard to forum shopping will be made in a short term.



# Austria

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Generally, the possibility of a debtor changing his domicile or registered seat is accepted under Austrian doctrine as this is in line with European regulations and Economic Freedom. The (accepted) reasons can be either private or economic motives such as the cost of living or operating a business or the cost of proceedings may be cheaper in the other state or a higher income may be generated there. Further, the other State may provide an insolvency law which favours restructurings of companies/individuals. However where forum shopping is purposefully chosen to disadvantage creditors, the Austrian courts have power to prevent it. In order to be able to distinguish between acceptable and non-acceptable forum shopping, a comprehensive weighing up of interests is undertaken. If the result of such balancing of interests is that the interests of the departure state deserve more protection than the interests of the arrival state, the old COMI shall continue to have effect. Further, attempts to manufacture an unjustified COMI may be met with allegations of abuse of law or evasion of the law (fraud legis). However, attempting to perpetuate the idea of an 'old' COMI conflicts with the fundamental freedoms of the European Union so that the position of the Austrian courts regarding the changes of COMI cannot be too restrictive.

General comment: The Austrian Supreme Court ("Oberster Gerichtshof") has only dealt twice with legal questions regarding "COMI".

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The debtor was an individual and owner of real estate in Austria on which four apartments were located and which were rented out and generated regular income.<sup>1</sup> He further rented out real estate in Germany. On 27 October 2004 he gave the Austrian police notice of leaving Austria and rented a small apartment in London (one bedroom with use of kitchen and bathroom) in a huge complex where a lot of limited companies were "registered". The debtor also (at least from time to time) lived in Austria in one of his apartments, where he pursued his activities in connection with the renting out of his apartments. As a matter of fact the debtor was continuously on the move around Europe. Furthermore, the debtor had an office in the Austrian town of Innsbruck. Before the court, he declared that he was an employee of an English "Ltd" company, although he could

only provide a forged registration for such company. Following this, insolvency proceedings were initiated against him in Austria.

The EIR states the fundamental principle that only one COMI of a debtor exists and therefore only one Member State shall be competent to open the main insolvency proceedings. COMI shall be the location where the debtor generally administers his interests and which is therefore ascertainable by third parties. Therefore the crucial concern is the impression of third parties. Of importance are therefore, inter alia, the following criteria: corporate management, organisational structure, the most important management activities, and – with regard to individuals – the habitual residence or the domicile and place of work. If – as in the case at hand – the "enterprise" of an individual only encompasses the renting out of several apartments in Austria, the debtor however also uses a domicile in Austria and performs activities in Austria and, on the other hand, only has a rented flat in the UK, it is to be assumed that, according to the facts, which are ascertainable by third parties, the actual COMI of the debtor is in Austria.

The decision puts paid to attempts to conceal the real residence in order to attain a more favourable forum for insolvency proceedings (forum shopping).

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The debtor was an individual person who had lived and worked in Spain since 1999 and was married to a Spanish citizen.<sup>2</sup>

To open insolvency proceedings a court is competent in the jurisdiction where the debtor has its COMI according to Art 3 para 1 of the EIR. According to the wording of the provision it is unclear whether the COMI of individuals is his place of residence (in accordance with the prevailing ECJ opinion regarding the EIR) or his habitual abode (as according to the Austrian Insolvency Code). However, with regard to individuals who pursue a business activity, the location where such activity is pursued is generally the COMI of such person. In the present case, the competency of the Austrian courts for insolvency proceedings was therefore negated given the debtor worked in Spain.

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<sup>1</sup> Austrian Supreme Court ("Oberster Gerichtshof"), 30 November 2006, 8 Ob 12/06g.

<sup>2</sup> Austrian Supreme Court ("Oberster Gerichtshof"), 16 January 2008, 8 Ob 134/07z.

# Belgium

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With regard to the EIR, the Belgian jurisprudence is very limited. However, a recent decision from the Court of Appeal in Liege gives a good overview of the Belgian courts' interpretation of Art. 3 para 1 of the EIR. In this case the principles as set out in the Eurofood case of the European Court of Justice were followed.<sup>1</sup>

By a judgment of 10 November 2010, the Commercial court of Verviers opened a procedure of judicial reorganisation by collective agreement in favour of Delos France SARL. The Public Prosecutor contested on appeal the competence of the Belgian Tribunal pursuant to Art. 3 para 1 of the EIR on the basis that the registered office of the company was situated in Lille and its activities were mainly conducted in France. The Defendant in the appeal (Delos France SARL) claimed among other factors that given the registered office of the company was notional, that it had no staff in France and that it was in fact managed by a management committee located in Belgium, the COMI was located in Belgium.

By stating that the presumption that the COMI is situated in the Member State where the registered office is located can only be rebutted by factors that are both objective and ascertainable by third parties, the Court confirmed the reasoning given by the ECJ in the Eurofood judgment. The fact that the correspondence received at the registered office in France was transferred to Belgium was not enough to change the COMI, as third parties were entitled to assume that because all correspondence arrived at the registered office, the COMI was situated there. Furthermore, the fact that there was no paid staff was also irrelevant as this was not verifiable by third parties. This was also the case for the de facto management in Belgium since it was not demonstrated by any documentation (that third parties could have considered). On the contrary, the fact that the company had a bank account in Lille and that the company's letterhead only contained its French address details were objective elements from which third parties could conclude that the COMI was situated in France. The Court therefore ruled that the Belgian Courts had no territorial jurisdiction and accepted the appeal.

The Court confirmed the main proposition developed by the European Court of Justice in the Eurofood-case: the presumption that the COMI of a company is situated in the jurisdiction where its registered office is situated can be rebutted only if factors that are both objective and ascertainable by third parties (i.e. by creditors of the company) establish that the COMI should not be in the location of the debtor's registered office.

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With regard to the concept of COMI the Supreme Court censured a decision of the Court of Appeal of Mons which did not take into account objective elements of the case to decide whether the COMI was located in Belgium or not.<sup>2</sup>

The Court of appeal of Mons refused to open bankruptcy proceedings in Belgium arguing that the company's activities were only situated in France without taking into account the following facts: the company was validly registered at the Company Registry in Belgium, at the National Social Security Office and registered for VAT in Belgium, the leasing of a warehouse and office in Belgium, liabilities resulting from Belgian creditors etc. The Belgian Supreme Court overturned the decision pronounced by the Court of Appeal of Mons by judging that the Court of Appeal did not examine the objective factors of the case. The Belgian position is comparatively neutral and essentially follows the main position developed by the European Court of Justice. As noted above, it should be remembered that today only a few decisions have been made regarding COMI in Belgium.

The Belgian courts have not had many opportunities to apply the EIR. In the few cases considered in Belgium, the courts have referred systematically to the principles laid out by the European Court of Justice. The Belgian Courts do not take a protectionist view when it comes to forum-shopping.

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<sup>1</sup> Court of Appeal of Liège 28 April 2011, T.B.H. 2012/2, February 2012, pp. 165-172.

<sup>2</sup> Belgian Supreme Court 27 June 2008, J.L.M.B. 2008/28, pp. 1222-1226.

# France



The first decision was rendered by the Commercial Court of Nanterre, the issue concerned the COMI of different European subsidiaries and the governing law of the proceedings initiated against these subsidiaries.<sup>1</sup> The *Redressement judiciaire* proceedings of three parent companies of EMTEC Group were opened by the Commercial Court of Nanterre. Then the same Court opened a *redressement judiciaire* proceedings against several subsidiaries established in Germany, Belgium and Poland.

The court ruled that several facts should be taken into account, such as:

- Place where the meetings of the Board were held;
- Law governing the major contracts;
- Location of business relationships with customers;
- Place where the organisation's business policy was defined;
- Requirement of prior authorisation of the parent company to enter into certain financial commitments;
- Location of creditor banks;
- Centralized management of the purchasing policy, accounting staff and computer system.

Furthermore, the court referred to the Council Regulation No.1346/2000 of 29 May 2000 and Court of Justice of the European Union precedents and restated that to determine the COMI of a company, a judge should refer to the concept of registered office functions and to facts establishing an

intensive level of control visible to third parties, who were not necessarily linked to the ownership of the share capital.

Consequently, the court ruled that it followed from the aforementioned facts that there was a body of evidence that the COMI of EMTEC Benelux within the meaning of Art. 3 paragraph 1 of the Council Regulation No. 1346/2000 of 29 May 2000, was located in France.

By this ruling, the Commercial Court of Nanterre has applied the Council Regulation No. 1346/2000 of 29 May 2000 to a group of companies and ruled that the notion of COMI of the debtor does not necessarily correspond to the place where the debtor has its registered office or place where it pursues its economic activity.

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In another case, before the Douai Court of Appeal of 2 May 2006, the main question concerned the location of the COMI of the company.<sup>2</sup> The French taxes administration requested the opening of a *liquidation judiciaire* against a company incorporated in the UK: TLMI.

Given the facts of the case the court ruled that the COMI of TLMI was located in France:

- Mr. Y, the sole manager and owner of TLMI, lived in France;
- A lot of commercial documents, such as confidential contracts, technical descriptions of products etc., were found in the home of Mr. Y and in the office of SCA,

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<sup>1</sup> Commercial Court of Nanterre, 15 February 2006, Dalloz 2006, jer. 793.

<sup>2</sup> Douai Court of Appeal 2 May 2006, CT0039.

- which was another French company;
- Mr. Y was an employee of SCA;
- The manager of SCA was Mrs. Y, the wife of Mr. Y;
- There were no expenses relating to travel between France and the UK appearing in the bank accounts of Mr. Y or Mrs. Y.

The Douai Court of Appeal applied the Council Regulation No. 1346/2000 of 29 May 2000 and ruled that the COMI of the debtor does not necessarily merge with the place where the debtor has its registered office.

The next case concerned the Eurotunnel group.<sup>3</sup> A member of the owning group, Eurotunnel PLC, was the guarantor of the entire financial debt carried by France-Manche and the Eurotunnel Finance Ltd. Like all the entities of Eurotunnel group, it faced financial difficulties: the debt exceeded their ability to repay.

The concept of COMI has an autonomous meaning and must be interpreted uniformly and independently of national legislation based on objective and ascertainable elements by third parties to prove the existence of a real situation different from the location that the registered office is supposed to reflect. A concordant body of evidence showed (ascertainable by third parties) that the COMI of the various entities of Eurotunnel was in France and especially in Paris.

The court referred in particular to the notion of strategic and operational management of the entity. This concept of “headquarters functions” had been previously employed with approval by English courts (Mr Justice Lewison in *Re Lennox*, a concept he later moved away from in a subsequent case – see UK submission below). The Commercial Court of Nanterre had likewise referred to it in its *EMTEC* judgment above. In accordance with *Eurofood*, this criterion alone could not, however, itself, be sufficient to justify overturning the presumption existing in favour of the registered office.

One of the most interesting and innovative issues in the case was the reference to the discussions concerning the restructuring of the group’s debt, which were mostly held in Paris, under the direct responsibility of the French president of most of the group entities. Consequently, the court concluded that the group companies’ COMI was in France. This ruling follows the *Eurofood* case in which the CJEU emphasized the importance of legal certainty.

In a case before the French Supreme Court, the question arose as to the COMI of an individual facing financial difficulties.<sup>4</sup> A German citizen, Mrs Schmitt risked engaging her liability as a result of a tax adjustment incurred in Germany. She tried to move into France to benefit from a liquidation procedure under the law of a specific French department (in this file Alsace-Moselle). This procedure was favourable to the debtor because under French law, she would be freed from the liability, whereas such an outcome would not be possible under German law. However, Mrs Schmitt’s relocation was found to be artificial and her actual residence remained in Germany.

From international jurisprudence it is clear that the French Court does not assume that the COMI of an individual is situated at his home or his residence, but at the place where the debtor manages his interests and is, therefore, ascertainable by third parties. Therefore, the Court of Appeal legally justified its decision by acknowledging that the debtor had accumulated a substantial liability in Germany where she operated. Mrs. Schmitt had rented an apartment in Alsace-Moselle together with her sister, who was involved in the same difficulties. She was leaving the rest of her family behind in Germany, did not speak the French language and her expenses for non-food needs were abnormally low. The French Supreme Court approved the Court of Appeal’s decision that the debtor did not have her COMI in France at the date of lodging her application.

The (rebuttable) presumption for companies (that COMI is located in the same place as its registered office) cannot be applied to individuals. Previously, the French Supreme Court had already decided that the COMI of a German individual was not in France given the facts that the debtor rented a room in France but worked in Germany and was a Swiss national but only had German creditors.

The British company MG Rover Group Limited owned all the shares of the British company MG Rover Overseas Limited, which in turn owned all the shares of the French company Rover France SAS. On April 8th 2005, the High Court of Birmingham (UK) opened insolvency proceedings against the MG Rover Group Limited. Rover France SAS and its main creditor, MG Rover Exports Ltd, had requested the opening of main insolvency proceedings against France SAS by joint petition. The proceedings were opened by the High Court of Birmingham on 10 April 2005. The High Court in Birmingham ruled that it had jurisdiction, relying on the judgment delivered on 18 April 2005 by Mr Justice Norris who ruled it was shown that the COMI of Rover France

<sup>3</sup> Commercial Court of Paris, 2 August 2006, *Dalloz* 2006, jur. 2329; bulletin July 2007/1, page 37, nr. 3.

<sup>4</sup> French Supreme Court (commercial chamber) 15 February 2011, No. 10-13.832.

<sup>5</sup> Versailles Court of Appeal 15 December 2005, *Dalloz* 2006, 379.

SAS was at Longbridge (UK) and he accordingly opened an insolvency proceeding under English law.<sup>5</sup>

The Commercial Court of Nanterre confirmed the opening of insolvency proceedings under English law against the French subsidiary of the group, Rover France SAS. The Prosecutor of Nanterre lodged an appeal against the judgment of the Commercial Court of Nanterre, denouncing the improper use of Article 3 of the Council Regulation No. 1346/2000 for purposes of “judicial expansionism”. It held that the Court should have refused the recognition of the English judgment because:

- The Commercial Court of Nanterre should have checked the proper enforcement by the High Court of Birmingham;
- The English judgment was contrary to public policy under Article 26 Council Regulation No. 1346/2000.

If the Court approved the opening of the main proceeding in the UK, the prosecutor requested the opening of secondary French proceedings in favour of Rover France SAS.

The Court of Appeal confirmed the judgment that held that neither the recognition nor the execution of the insolvency proceedings opened by the High Court of Birmingham, were manifestly contrary to French public policy, and that therefore the recognition of the main proceedings could not be denied. The opening of secondary insolvency proceedings was desirable only if it had a utility that the claimant must demonstrate. In this case, it was not shown that the opening of secondary insolvency proceedings had any particular advantages, such as improving the protection of local interests or the realization of assets.

The judgment of the Court of Appeal of Versailles brings an important contribution to the interpretation of the Council Regulation No. 1346/2000 and its application to groups of companies. While showing a remarkable pragmatism, the court met both the letter and spirit of the Council Regulation No. 1346/2000.

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An insolvency proceeding of a British company, Isa Daisytek, (in this instance an administration order) was opened by the Leeds’ High Court in England. The company had several subsidiaries, including a French company.<sup>6</sup> The High Court ruled that it had jurisdiction to open main insolvency proceedings for the parent company, and also for its various subsidiaries. Indeed, the court considered that the COMI of the French subsidiary was situated in the UK given the fact that the subsidiary was directly managed by the parent company located in Bradford (UK).

Less than two months later, the Commercial Court of Pontoise (France) opened *redressement judiciaire* proceedings against the French subsidiary as a main insolvency proceedings based on the head office criterion, as it was located in France. The British administrators appointed by the Leeds’ High Court lodged an opposition to this judgment, arguing that according to the Council Regulation No. 1346/2000, the proceedings opened in England forbade the opening of other main insolvency proceedings in France. The Commercial Court rejected the argument. An appeal was lodged against this decision and the Court of Appeal confirmed that despite of the opening of the British insolvency proceedings, any French main insolvency proceedings could also be opened. An appeal in cassation was formed by the French public prosecutor. The French Supreme Court considered the decision of the Court of Appeal.

The Supreme Court noted that the Leeds’ High Court of Justice had found that:

- the COMI of the company was located in Bradford (UK);
- it had jurisdiction for this case, having examined the basis for its assumption of jurisdiction under Art. 3 paragraph 1 of the Council Regulation No. 1346/2000.

Accordingly, the French Supreme Court ruled that:

- the French Court of Appeal did not have to check the reasons that enabled the Leeds’ Court to reverse the presumption of Art. 3 of the Council Regulation No. 1346/2000;
- could not open main insolvency proceedings after main proceedings had been opened by the High Court in the UK.

This decision recognised validity of the foreign decision relating to the opening of a main procedure in accordance with the criteria of the Council Regulation No. 1346/2000 and prevented the French courts from opening a different set of main proceeding in opposition to the purpose for which the Council Regulation No. 1346/2000 was created.

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A decision of the French Supreme Court dated 10 May 2012 has confirmed the decision of the ECJ in the *Rastelli* case dated 15 December 2011 in relation to the use of the criterion of COMI in the French extension of a company’s insolvency proceedings to another company having its registered office in another Member-State of the EU.

In the *Rastelli* case the French Court of Appeal of Aix-en-Provence has approved the decision of the judges of the Commercial Court of Marseille relating to the extension

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<sup>6</sup> French Supreme Court (commercial chamber) 27 June 2006, No. 03-19.863.

of the French judicial liquidation procedure of the company Mediasurcre International to the Italian company Rastelli on the grounds of the insolvency proceedings universality principle. However, the Council Regulation No. 1346/2000 of 29 May 2000 ignores such a rule of the extension, and provides only the criteria relating to the jurisdiction's competence: COMI and establishment. The ECJ was to respond to two questions:

- 1) whether a jurisdiction of one Member-State that has opened the main insolvency proceedings of a company deciding that the COMI of this company is located on the territory of this State may extend the proceedings, upon its national rules, to another company which registered office is located in another Member-State, on the unique ground of the confusion of their assets;
- 2) whether it is possible to apply the Council Regulation No. 1346/2000 of 29 May 2000 in order to extend the insolvency proceedings to another company having its registered office in another Member-State by saying that as the companies' assets were confused the COMI of the foreign company is located in the place of the opening of the first insolvency proceeding.

Firstly, the ECJ judges that on the grounds of national rules a jurisdiction of a one Member-State cannot extend the insolvency proceedings of a company having its COMI in this Member-State to another company which has its registered office in another Member-State, except if it is demonstrated that the second company's COMI is located in the Member-State that opened the insolvency proceedings.

Secondly, a simple fact of assets confusion between the companies located in different Member-States is not sufficient to establish that the COMI of the second company is located in the first Member-State.

The French Supreme Court has ruled that the mere fact of the assets confusion between two companies having their register offices in different Member-States was not sufficient to fix the COMI of the Italian company in France.

# Germany



A Cologne case dealt with the insolvent PIN-Group AG S.A., a company whose registered office was in Luxembourg.<sup>1</sup> The PIN-Group AG S.A. was the holding company of over one hundred subsidiary entities. Most of them operated in connection with the business of postal delivery services in Germany. The holding company had the purpose of steering the group. In December 2007 the executive board of the holding company was transferred from Luxembourg to Cologne. During this process the members of the board were replaced by individuals also located in Germany. In the same month the entire business documentation process was to be transferred from Luxembourg to Cologne. From the beginning of 2008, the holding company also leased offices in Cologne with the intention of establishing the management of the whole group in Cologne. For this reason the new executive board appointed an executive committee consisting of people who controlled the business of the affiliates. Once a week this executive committee met in the new (German) offices. In January 2008 the holding company also opened an account with a bank in Cologne. In addition the new executive board conducted negotiations with the main creditors, service providers and potential investors in the new offices. In contrast the holding company only carried out minor peripheral activities such as forwarding incoming post from Luxembourg to Cologne from December 2007 onwards.

The Court ruled that the presumption (as to COMI being where the registered office was located) in Art. 3 para 1

of the EIR was rebutted if the company only carried on marginal activities at the place of its registered office. The Local Court in Cologne affirmed its ability to open insolvency proceedings (assuming it was satisfied on COMI). As regards the COMI registered office presumption, the Local Court supported the jurisprudence of the European Court of Justice. In its *Eurofood*-judgement the European Court of Justice ruled that the presumption in Art. 3 para 1 is rebutted particularly if the company has no business at its registered office. The Local Court decided that whilst this factor was not definitive, in the present case the presumption in Art. 3 para 1 was rebutted, because the holding company only carried on peripheral activities at its registered office. Furthermore, the Local Court assumed that the COMI of the holding was in Cologne no later than January 2008. From that moment on the holding company conducted its main activities like group management, purchasing, marketing and restructuring in Cologne. These circumstances were also clear and ascertainable by third parties, because the new executive board conducted negotiations with creditors, service providers and investors in their offices in Cologne.

In addition, the Local Court determined that the transfer of the COMI from Luxembourg was not an abuse. The intention of the transfer was to restructure the whole group, where most affiliates were located in Germany. The basic principle was to acknowledge that forum-shopping is legal and part of the freedom of establishment under European law.

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<sup>1</sup> Local Court in Cologne 19 February 2008 (file number 73 IE 1/08), NZI 2008, 257 ff.

The Local Court in Cologne supported the view of the European Court of Justice. The Local Court ruled that it was not necessary to show that the company had no business at all at the place of the registered office to rebut the presumption in Art. 3 para 1. Furthermore, the Local Court affirmed the COMI at the place where the essential decisions concerning the general management were taken and that these circumstances are clear and ascertainable to the company's main creditors and contractual partners. Thereby the Local Court followed the judgment of the European Court of Justice, which also determined the COMI by reference to objective criteria ascertainable by third parties. Furthermore, the Local Court ruled that forum-shopping is legal in general and part of the freedom of establishment.

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The Federal Court of Justice was required to decide on an insolvency petition by a company with its registered office in the Netherlands.<sup>2</sup> In 2007 the Dutch company acquired the shares of a German limited liability company and converted it into a German private limited partnership. The Dutch company became the general partner, and a further Dutch company the sole limited partner of the German private limited partnership. These Dutch shareholders never developed any business activities, either in Germany or in the Netherlands. Only the German private limited partnership carried on business in Germany. The shareholder of the Dutch companies was a German national with sole residence in Germany. In May 2008 the sole limited partner left the German private limited partnership with the legal effect of dissolving the German partnership and transferring its registered office from Germany to the Netherlands. The dissolving without liquidation was noted in the commercial register in Germany. The share of the sole limited partner was automatically transferred to the general partner in the Netherlands. In 2010 the insolvency administrator of a creditor of the German private limited partnership filed for insolvency over the assets of the Dutch shareholder at the Local Court in Düsseldorf. The Local Court refused to assume jurisdiction. The court of higher instance confirmed the judgment of the Local Court. The Federal Court of Justice overturned these judgments.

The Court decided that the international jurisdiction concerning the opening of insolvency proceedings over the assets of a company with its registered office abroad and which had discontinued business activities without liquidation depended on the company's COMI at the date of the termination of business activities. The judgment of the Local Court was based on the presumption in Art. 3

para 1 of the EIR. The Local Court in Düsseldorf based its ruling concerning the place of a registered office on the date of the filing for insolvency. In addition there was no objective indication that the COMI of the Dutch company was in Germany. The Regional Court in Düsseldorf confirmed this judgment. The Regional Court held that no indications objective and ascertainable by third parties were argued by the creditor's insolvency administrator. The Federal Court of Justice disagreed with these decisions on two points: Firstly, the Federal Court of Justice decided that the Local Court had to determine ex officio the relevant facts concerning the COMI. The presumption in Art. 3 para 1 only applied if the court's investigations had not arrived at a different conclusion. Secondly, the Federal Court of Justice ruled that in the present case the relevant date to determine the COMI is not the date of the insolvency petition but the date of the termination of business activities. The Federal Court of Justice referred to the *Interedil*-judgment of the European Court of Justice. Pursuant to this judgment, the relevant date to determine the COMI is the date of deregistration and termination of business activities, if the company has ceased to function and has terminated its business activities. The European Court of Justice tried to ensure that insolvency proceedings are opened in the jurisdiction where the debtor developed its last and most recent business activities ascertainable by third parties.

According to the opinion of the Federal Court of Justice it was not relevant in the present case that the company was still registered. To protect the creditors it was necessary to focus on the place of the final business activities. This was also obvious from the fact that the sole shareholder of the sole general partner in the Netherlands was a German national with his sole residence in Germany.

The Federal Court of Justice referred to the *Interedil*-judgment of the European Court of Justice although the facts of the case are different. In the ECJ a company was dissolved in England and liquidated in Italy; whereas in the German case the private limited partnership was automatically dissolved in Germany and the shareholder of the sole limited partner was transferred to the general partner in the Netherlands. The legal effect of the dissolving of the partnership was that the Dutch general partner became the legal successor to the German private limited partnership. The Dutch company was still registered in the commercial register in the Netherlands. Therefore, the judgment of the European Court of Justice was not applicable to the present case. However, the Federal Court of Justice does seek to limit abuses arising from forum shopping.

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<sup>2</sup> Federal Court of Justice 1 December 2008 (file number IX ZB 232/10), NZI 2012, 151 ff.

In a further German case,<sup>3</sup> the debtor operated three drugstores. In May 2010 he rented a flat in England. In June 2010 he discontinued his business activities in Germany by closing the doors of the three drugstores and moving to England. The debtor did not liquidate the drugstores; the employment and lease contracts were also not terminated and the goods stayed in the stores. Subsequently, only one drugstore had a successor operator. Owing to their stocks of remaining drugs the two other stores were sealed by the public authorities. In June 2010 a creditor filed for insolvency. The Local (and the Regional) Court in Aix-la-Chapelle affirmed its international jurisdiction.

The Federal Court of Justice approved the judgments of the lower courts. The debtor's forum-shopping was deemed to be an abuse. The debtor discontinued his business and moved to England with the sole intention of escaping from the impending insolvency petition. If a businessman discontinues his activities it is difficult to define the COMI by reference to the former place of business. But even in the case of businessmen, merchants and freelancers it is appropriate to establish the COMI by reference to any outstanding legal requirements of the pending liquidation in Germany. In the present case the debtor still had to comply with such requirements; the drugs were not stored safely nor were the employment and rental contracts being observed by anyone. The judgment indicates that the Federal Court of Justice will try to contain abuses of forum-shopping by a natural person as well as by corporate entities.

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There are a number of other German cases concerning the application of COMI. Secondary insolvency proceedings may only be opened if the debtor has an establishment in the respective Member State, irrespective of where the COMI is located.<sup>4</sup> Individual assets are not sufficient to justify an establishment.<sup>5</sup> Furthermore, if the court cannot locate the actual COMI of the debtor, the burden of proof that the debtor has established a place of residence abroad prior to the insolvency application lies with the debtor.<sup>6</sup>

In one case, the debtor had been granted a release of his debts in English insolvency proceedings.<sup>7</sup> A creditor demanded payment of debts which were covered by the (English) debt release. If the debtor had moved his COMI

to England only to avoid such debt claims, it is possible that the debt release granted under English law could be disregarded as a violation of the German *ordre public* under Art. 26 of the EIR. It is doubtful whether a decision taken by a court of a member state may be disregarded based on art. 26 EIR and arguably the German court had no jurisdiction as the question of jurisdiction is addressed by Art. 16 EIR.<sup>8</sup>

Another case shows clearly that if the COMI of the debtor is in Germany, German law is applicable to the insolvency proceedings, but assets located in other countries may be part of the insolvency estate. Which law is applicable on a claim belonging to the insolvency estate is a question of private international law.<sup>9</sup>

In the final case to be discussed, main insolvency proceedings were opened in Poland and secondary proceedings with regard to an establishment were opened in Germany.<sup>10</sup> The administrator in the German secondary proceedings raised claims against the debtor company as "quasi – shareholder" of the establishment company. Neither Art. 32 of the EIR nor § 93 of the German Insolvency Act entitles the secondary insolvency administrator to raise claims against the debtor company in the state where the secondary proceedings are opened.

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<sup>3</sup> Federal Court of Justice 6 October 2011 (file number IX ZB 249/10), BeckRS 2011, 23914.

<sup>4</sup> BGH 8 March 2012, NZI 2012, 377.

<sup>5</sup> BGH 21 June 2012, NZI 2012, 725.

<sup>6</sup> AG Köln 19 January 2012, NZI 2012, 379.

<sup>7</sup> LG Köln 14 October 2011, NZI 2011, 957.

<sup>8</sup> See Mankowski, NZI 2011, 958 f.

<sup>9</sup> OLG Hamm 15 September 2011, BeckRS 2011, 25081.

<sup>10</sup> KG Berlin 21 July 2011, NZI 2011, 729.

# Hungary



A company was set up in the United Kingdom in 2008 in order to create a new owner for the registered establishment in Hungary, because the earlier owner became insolvent.<sup>1</sup> The company did not carry out any business activities in the UK and the assets of the company were all situated in Hungary. The owner filed a petition in Hungary to open main proceedings of the UK registered company. The court ordered the opening of main proceedings of the company in Hungary on the basis that it was established that the company did not carry out business activities in the UK. All of the business assets were in Hungary and all of its business activities were related to the Hungarian registered establishment and this was ascertainable by third parties. The court ruled that the presumption that the COMI of a company is where its registered office is situated can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established and that an actual situation exists which is different from the location that the registered office is deemed to reflect.

The tax authority as a creditor filed a petition to open main insolvency proceedings in Hungary against a Slovakian company.<sup>2</sup> The director of the company had Hungarian nationality, lived in Hungary and the main activity of the company was performed in Hungary, though the registered office of the company was in Slovakia.

The court considered the evidence given by the creditor (the debtor did not make any statements in the proceedings) and drew the conclusion that the director's address, the place of a formal judicial enforcement against the company and the taxation documents all showed unambiguously that the COMI of the company was in Hungary. The case concentrated on the relevant factors to rebut the presumption that the COMI is located in the place of the registered office. Rebutting the COMI presumption can be very difficult for a creditor. Tax authorities typically have more tools available to evidence where the COMI may be located.

Main proceedings against an Austrian company were opened by a court in Graz (Austria).<sup>3</sup> The main liquidator filed a petition with the Austrian court to open main insolvency proceedings of the Austrian company's subsidiary, a Hungarian company, on the basis that all of the important business decisions of the Hungarian company were made in Austria. The Austrian court opened main proceedings against the Hungarian company on 1 August 2008 and appointed the main liquidator. The main liquidator subsequently asked the Metropolitan Court in Budapest to publish the opening of the main proceedings in the Hungarian Official Gazette. The Hungarian company had creditors in Hungary, who had filed a petition against the Hungarian company at the

<sup>1</sup> Metropolitan Court of Budapest 14 January 2009, Fővárosi Bíróság 9.Fpk. 01-08-006081/6.

<sup>2</sup> Metropolitan Court of Budapest 14 October 2008, Fővárosi Bíróság 9.Fpk. 01-08-003390/6.

<sup>3</sup> Metropolitan Court of Budapest 17 September 2008, Fővárosi Bíróság 9.Fpk. 01-08-001806/9.

Metropolitan Court. One of the creditors became aware of the information in the Official Gazette concerning the opening of main insolvency proceedings in Graz, and filed a petition to open secondary proceedings in Hungary. The Hungarian company did not have any activities outside of Hungary.

The court ordered the opening of secondary proceedings of the Hungarian company, after determining ex officio that the company had its establishment in Hungary. The court found that the company was not only registered in Hungary, but all of its business activities were connected to Hungary.

The Austrian court terminated the main insolvency proceedings because there were no assets in the main procedure, while the secondary proceedings were still pending. According to the Hungarian national insolvency law, the court has to terminate the debtor company at the end of the proceedings. The Austrian court did not order the termination of the company in the main insolvency proceedings, thus the secondary proceedings continued in Hungary.

The tax authority as a creditor filed insolvency proceedings against a company whose registered office was in the USA, but whose alleged COMI was in Hungary.<sup>4</sup> The creditor proved that the debtor had its business address in Hungary, and it had moved its business activity to Hungary. It could not be proved, however, that the debtor still existed under the laws of the USA at the time the request was received by the court. The court stated that it is not important where the registered office is located and that only the place of the COMI has to be taken into consideration when the court establishes its jurisdiction. The court would have had jurisdiction if the debtor still existed, but according to the USA registration rules the company did not exist anymore. The Hungarian Bankruptcy Act does not allow the opening of insolvency proceedings against a company which does not exist; and so the court refused the petition.

The case can serve an example in proceedings against off-shore companies whose registered offices are in tax havens but whose activities are within the EU. The decision followed the judgment of the High Court of Justice (BRAC Budget Rent-A-Cart, High Court of Justice Chancery Division Companies Court (England) 07.02.2003 EWHC/Ch/128-0042/2003)

The German owners of a Hungarian textile company applied to the Amstgericht Hechingen to open main insolvency proceedings against the Hungarian company.<sup>5</sup> They stated that the COMI was in Germany. The German court opened main insolvency proceedings on 31 March 2005 and appointed a main liquidator. The main liquidator terminated employment contracts on the date when the main proceedings were opened in Germany and without taking into account the rules of Hungarian labour law. The employees filed an objection against the liquidator in the Hungarian court, which considered this as a petition for opening secondary proceedings and appointed the secondary liquidator to oversee the secondary proceedings. The Hungarian court opened secondary proceedings to resolve the claims of the employees and to liquidate the company.

Insolvency proceedings were opened against a German natural person in a court in Germany.<sup>6</sup> The insolvent German debtor owned real estate in Hungary. The provisional liquidator applied to register the opening of the insolvency proceedings in the Hungarian land register. The court stated that the EIR in a cross-border situation extends the personal jurisdiction of the national law. The legal consequences of the opening of main proceedings as laid down in the EIR have to be taken into consideration by all other Member States. The court therefore ordered registration of the insolvency proceedings in respect of the real estate in the land register in Hungary.

Due to the lack of domestic Hungarian rules relating to a consumer insolvency situation, the liquidator asked for guidance on what such a registration meant for real estate (for example who would be entitled to sell it). The court held that, in this case, the Hungarian land registration rules should be applied in accordance with the German judgment. The court also noted that decisions of the German court should be considered as bearing the same consequences as opening main insolvency proceedings against a Hungarian company in Hungary. This decision extended the personal jurisdiction of the national insolvency acts and referred to the importance of a well drafted judicial decision when different jurisdictions have a role in the matter and especially when domestic legislation is silent on a matter.

<sup>4</sup> Metropolitan Court of Budapest 24 September 2007, Fővárosi Bíróság 9.Fpk. 01-06-006017/13.

<sup>5</sup> Komárom-Esztergom County Court 5 June 2005, Komárom-Esztergom Megyei Bíróság 3.Fpk.11-05-070162/9.

<sup>6</sup> Metropolitan Court of Budapest 13 September 2004, Fővárosi Bíróság 9. Eufpk.01-04-000001/6, Fővárosi Bíróság 9. Eufpk.01-04-000001/9.

# Italy

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With regard to the interpretation of Art. 3 para 1 of the EIR it is clear that the unanimous jurisprudence of the Supreme Court is easily to overcome the (rebuttable) presumption provided for in Art. 3 para 1 of the EIR, namely that the Member state where a company has its registered office is the appropriate jurisdiction for opening main proceedings. In fact, the Supreme Court in several decisions does not give enough prominence to the company's registered office as such, considering instead the significance of the place of the actual operation and administration of the company; in essence, the place where the company carries out its proper economic, directive, administrative and organizational activity. In general, the Supreme Court focuses on those objective elements which can be verified and ascertained by third parties in order to ascertain the real COMI position as opposed to the formal location of the registered office. In the light of this, COMI will not be recognized in the place of the registered office where the registered office of a company does not correspond to the proper operational structure of the company itself.

Also in the cases concerning COMI, the jurisprudence of the Supreme Court is fairly unanimous. As mentioned, COMI is to be considered essentially the place where the economic, directive, administrative and organizational activity of the company is actually carried out. In this regard, the cited jurisprudence suggests that a company with its registered office in another member State and which owns immovable property in Italy, should not for that reason alone qualify the Italian courts to open main insolvency proceedings. On the other hand, there is limited authority for the proposition that, in contrast to the above, Italy is the true COMI of a company with its registered office in Luxemburg but where (i) the whole share capital is held by an Italian company, and (ii) the only Director of the Board of Directors from Luxembourg has not been granted any managing powers.

On the basis of a number of Italian decisions on COMI, Italian courts are fully in agreement with the principles on which the EIR has been built, with particular reference to the concept of forum shopping. In this respect, the main decisions of the Supreme Court on this point are aimed at definitively and clearly stating the 'ascertainable by third parties' concept of COMI and recognizing the

registered office jurisdiction as an easily overcome rebuttable presumption.

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Following the filing of a petition of insolvency from a few creditors of an Italian company with the Court of Siena (Italy), the debtor claimed the competence of the Spanish Court to open main proceedings since it had transferred its registered office to Spain, just before the filing of the said petition.<sup>1</sup>

Given that the EIR does not contain a definition of COMI, decisions are more at the discretion of the national judges to establish whether or not the COMI of a company corresponds to its registered office.

The Supreme Court denied that the proper forum for opening main proceedings was in Spain, finding a fictitious transfer of the registered office to this member State. Since the actual place of operational and administrative power of the company was based in Italy, the Supreme Court confirmed Italy as the proper jurisdiction for main proceedings – its proper COMI was in Italy.

The above decision confirms the unanimous Italian jurisprudence on Art. 3 of the EIR on the interpretation of the concept of COMI. The case gives a clear example of how the Italian Courts are keen to overcome the presumption of jurisdiction based on the place of the registered office.

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<sup>1</sup> Supreme Court, United Sections, 3 October 2011, No. 20144; Supreme Court, United Sections, 1 February 2010, No. 2224; Supreme Court, United Sections, 18 May 2009, No. 11398; Supreme Court 16 February 2006, No. 3368; Supreme Court, United Sections, 25 May 2005, No. 10606; Court of Rome, 21 November 2011 No. 606/2011.

# Luxembourg



World Systems (Europe) Limited was a company having its registered office in the United Kingdom. It had entered into insolvency proceedings in United Kingdom but also had a branch office registered in Luxembourg.<sup>1</sup> The employees as creditors of the Luxembourg branch office addressed their claims to the Luxembourg Court based on Art. 3 para 2 of the EIR (a Member State in which the company not has its COMI may open secondary proceedings if it has an establishment there). The Luxembourg Court declared Luxembourg to be the competent jurisdiction for dealing with the Luxembourg claims. With regard to the notion of a branch office (*succursale*) the Court referred to the definitions given by the European Court of Justice.

A company having its registered office in Gibraltar entered into insolvency proceedings in Gibraltar, again having a branch office registered in Luxembourg. The creditor addressed its claim to the Luxembourg Court.<sup>2</sup> The Luxembourg Court decided that the Gibraltar courts were competent with regard to the insolvency proceedings, not Luxembourg, based on Art. 3 para 1 of the EIR (main proceedings to be opened where the company has its COMI). The conditions of Art. 3 para 2 EIR were not fulfilled since there was no activity in another EU Member State.

A French Court pronounced the forced liquidation of a company registered in Luxembourg. The opening of the liquidation procedures had been registered in Luxembourg.<sup>3</sup> The French Court further decided that the company should be deregistered at the Luxembourg registry, which the Luxembourg registrar did. The company disapproved of the deregistration and claimed that the French Court was not competent. The Luxembourg Court decided that the French Court had competence, based on Art. 3 para 1 and 2 of the EIR, because of the COMI being in France.

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<sup>1</sup> Jugement commercial II No. 657/04 02/07/2004 No. 88225.

<sup>2</sup> Tribunal d'Arrondissement 08/06/2009 No. 120 898.

<sup>3</sup> Cour d'Appel 02/12/2009 No. 34882.

# The Netherlands

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In the first case discussed, a creditor filed a petition for bankruptcy of its debtor, the commercial partnership ("*vennootschap onder firma*") Handelskwekerij Lidia & Willem van Kester v.o.f., on 28 April 2009.<sup>1</sup> However, on 6 May 2009 it was registered in the chamber of commerce that Handelskwekerij Lidia & Willem van Kester v.o.f. had discontinued its business activities on 1 January 2009. Nevertheless during the hearing of the bankruptcy request, the winding-up of Handelskwekerij Lidia & Willem van Kester v.o.f. was not yet formally completed, although the business activities had already relocated to Poland. The Supreme Court had to determine whether the COMI of Handelskwekerij Lidia & Willem van Kester v.o.f. was (still) in the Netherlands.

The Supreme Court ruled that the COMI of Handelskwekerij Lidia & Willem van Kester v.o.f. was in the Netherlands since the winding-up was not fully completed during the hearing of the bankruptcy request. The mere circumstance that the business activities were relocated to Poland, did not mean that the COMI was no longer in the Netherlands.

In this case the Supreme Court ruled – in accordance with the ruling of the European Court of Justice in the case (ECJ 17 January 2006, *Staubitz-Schreiber*) – that based on Art. 3 para 1 of the EIR the court of the member state within the territory of which the COMI was situated at the time when the creditor filed the request to open insolvency proceedings retained jurisdiction to open those proceedings even if the debtor moved the COMI to the territory of another member state after lodging the request but before the proceedings were opened.

Furthermore the EIR presumes, unless proved to the contrary, that the debtor's COMI is the place of its registered office. Since partnerships do not have a registered office, it is still unclear whether the presumption of the registered office also applies to partnerships.

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A number of companies had filed an application for a moratorium ("*sursance van betaling*") at the District Court of Roermond while their registered offices were in Belgium and Germany.<sup>2</sup> Therefore the District Court of Roermond had to determine whether the presumption in favour of

the registered office of these companies could be rebutted based on the factual circumstances.

The District Court of Roermond ruled that the presumption of the registered office could be rebutted in this case since:

- companies that had registered offices in Belgium and Germany were members of the Henzo-concern and were controlled by the company Henzo Internationale Group B.V., which had its principal place of business in the Netherlands. This also appeared from the consolidated annual accounts of 2006;
- the foreign companies were only sales offices, while the delivery to the customers was made from the Netherlands;
- the company registered in Belgium was in fact a letterbox company. The office of the company registered in Germany was currently unoccupied pending the expiration of a tenancy agreement; and,
- the foreign employees that worked from their homes were instructed and controlled by the Dutch director.

The District Court of Roermond ruled in this case that the head office functions were carried out in a member state other than that in which the registered office was located.

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X and Y were declared bankrupt by the court at first instance following a petition of Rabobank.<sup>3</sup> They appealed that decision arguing that the Dutch courts did not have jurisdiction because their COMI was not situated in the Netherlands but in Italy. X and Y argued that, even though they were registered in the Netherlands, at the time Rabobank filed the petition they were living and had been registered in Italy for a number of years, where they had economic activities, and that they had no (economic) activities in the Netherlands other than the winding up of a number of old and inactive companies. The liquidator appointed in the bankruptcy of X and Y, who was present at the hearing on the appeal, stated that he had only come across economic activities and creditors of X and Y in the Netherlands. Rabobank submitted evidence indicating that X and Y used their Dutch address in official documents, that they had carried out economic activities in the Netherlands and that X was sole shareholder and director of a number of Dutch companies.

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<sup>1</sup> Supreme Court 22 December 2009, LJN: BK3574, NJ 2010/15, RvdW 2010/38, JOR 2010/247.

<sup>2</sup> District Court of Roermond 17 November 2008, JOR 2009/55.

<sup>3</sup> Appellate Court Amsterdam 13 November 2009, LJN: BL1967, JOR 2010/169.

After observing that according to paragraph 13 of the preamble of the EIR the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, the court decided that the COMI of X and Y was situated in the Netherlands on the basis of the facts brought before the court by Rabobank and the liquidator. These facts were:

- no documentation demonstrating that X and Y were living in Italy;
- the Dutch creditors in the bankruptcy followed from economic activities in the Netherlands.

The Dutch Court of appeal decided that the COMI was situated in the Netherlands and that the facts put forward by X and Y were not enough to rebut the presumption of Art. 3 para 1 of the EIR.

Jaya had filed a petition to have X declared bankrupt.<sup>4</sup> The first instance court denied jurisdiction because it held that the COMI of X was situated in Germany and not in the Netherlands based on a statement by X that she lived in Germany (where she was also registered) and was about to start a new job. Jaya appealed that decision arguing that X had her COMI in the Netherlands because X was still (also) registered in the Netherlands, in her contacts with Jaya consistently used her address in the Netherlands and counsel of Jaya had spoken to X on her Dutch landline after she had allegedly moved to Germany. X argued that she had moved to Germany with her husband, while continuing to use their Dutch house for recreational purposes.

The court found that the mere fact that X was also registered in Germany was insufficient to assume that the COMI of X was situated in Germany. As the arguments advanced by Jaya that the COMI of X was situated in the Netherlands had not been refuted by X, the court concluded that the Dutch courts had jurisdiction. The Court of appeal decided that the presumption was not rebutted enough in order to decide that the COMI was situated in Germany.

Altrecht Holding BV was declared bankrupt by the court of first instance in Leeuwarden, the Netherlands, at the request of Rabobank.<sup>5</sup> Altrecht Holding BVBA (a Belgian Company) appealed this decision by stating that the registered office of Altrecht Holding BV had been moved to Belgium and that therefore the Dutch judge did not have the jurisdiction to declare Altrecht Holding BV bankrupt.

Because the registered office had been moved to Belgium, the latter was the competent court and jurisdiction.

The Dutch judge decided that it was competent because the movement of the registered office had not been completed as in the Dutch Chamber of Commerce Altrecht Holding BV was still known. Moreover the trustees decided that there were not any economic activities in Belgium and the creditors of the Dutch company were situated in the Netherlands. The presumption has not been rebutted enough in order to decide that the COMI is not placed in the same country as where the registered office is situated.

NSCB was declared bankrupt by the court of first instance in Leeuwarden, the Netherlands, at the request of Lok and others.<sup>6</sup> On appeal NSCB, inter alia, argued that the Dutch courts did not have jurisdiction to open insolvency proceedings in respect of NSCB because its COMI was located in Estonia: Its registered office was situated in Estonia, the company was managed from Estonia, the working capital of the company was located in Estonia, the costs for setting up the Dutch establishment were funded out of Estonia and the company was active in Estonia as a securities' broker. Lok and others argued that they could not establish where NSCB performed its activities but pointed out that it was clear that NSCB in any event operated in the Netherlands and that it was not clear that the same was true for Estonia. Furthermore, Lok and others argued that, if the Dutch courts did not have jurisdiction on the basis of Art. 3 para 1 of the EIR, their petition should be regarded and dealt with as a petition to open insolvency proceedings in respect of NSCB's Dutch establishment on the basis of Art. 3 para 2 of the EIR.

The court decided that the petitioners had not succeeded in presenting a reasonable case, let alone provided proof, that NSCB's COMI was in the Netherlands. Consequently, NSCB's COMI was presumed to be situated in Estonia where its registered office was located and the Dutch courts did not have jurisdiction to open insolvency proceedings in respect of NSCB on the basis of Art. 3 para 1. The court found that it would contravene rules of proper procedure to deal with the petition as a petition to open insolvency proceedings in respect of NSCB's Dutch establishment on the basis of Art. 3 para 2 of the EIR and denied the request. The presumption had not been rebutted enough in order to decide that the COMI was not situated in the same country the registered office.

<sup>4</sup> Appellate Court Arnhem 23 July 2009, LJN: BJ5603.

<sup>5</sup> Appellate Court Leeuwarden 21 July 2011, JOR 2011/314.

<sup>6</sup> Appellate Court Leeuwarden 9 april 2009, [www.insolvencycases.eu](http://www.insolvencycases.eu).

# Poland



The company had its registered office in England, but had opened a branch in Poland.<sup>1</sup> (A branch is regarded by the Polish Commercial Companies Code as a “part” of a legal entity, having no separate corporate existence). In practice, the business activity, i.e. the sale of household equipment on the internet, was conducted by the company within the territory of Poland only.

Even though all members of the management board lived in England and Wales, during the proceedings it was proven that the main decision-making process took place in Poland (and was conducted by an attorney of the Management Board), the day-to-day operation and accounting was conducted there, all employees and co-operatives were in Poland, and the products were sold in Poland to Polish purchasers. This led the court to the conclusion that, in practice, the company – even though it was registered in England – conducted almost no commercial activity in that country. The bankruptcy court in Warsaw found it legitimate to open bankruptcy proceedings under Art. 3 of the EIR.

This is the first case where a Polish court has ordered the bankruptcy of a company with a registered office in the territory of another state. Generally, the application of the EIR is still not common in Poland. Courts in major cities (like Warsaw or Poznań) have dealt with the EIR mainly with respect to the initiation of secondary proceedings under Art. 3 para 2 of the EIR – and here the jurisprudence is quite wide. This results from the

currently observable trend of structuring groups of companies, i.e. it is noticeable that many such groups have their mother companies in England, France, the Netherlands or Germany, and they operate in Poland through a subsidiary company or a branch – in both cases it is common that the main and strategic decision-making process remains with the holding company.

As regards current opinion in Poland on forum shopping pursuant to Art. 3 of the EIR, certain jurisdictions are believed to be very “debtor friendly” (e.g. France). There have been a number of cases within the last few years where Polish banks granted financing to companies – members of international groups – which were then subject to bankruptcy proceedings in other member states (such as the French *sauvegarde* proceedings).

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<sup>1</sup> Betterware Poland Limited, bankruptcy announced in 2012, publicly available by the court.

# Portugal



Please note that, to the best of our knowledge, Art. 3 para 1 of the EIR has never been the subject of interpretation by the Portuguese Courts. In fact, although the aforementioned Article has been mentioned in some judgments, the range of its application has never been a matter of judicial discussion.

However, as it affects companies, a Portuguese scholar maintains that the presumption contained in Art. 3 para 1 of the EIR may only be rebutted when it is shown that the majority of the creditors was (or should have been) aware that the company is administered in another Member State. According to such reasoning, that may be, for instance, the case whenever (i) the company does not develop any economic activity in the State of the registered office and (ii) it has an especially significant connection with another State (Cfr. Lima Pinheiro, Luís, *“O Regulamento Comunitário sobre Insolvência – Uma Introdução”*, Almedina, Coimbra, 2007). As far as concerns individuals, the same scholar contends that the COMI of independent professionals should correspond to the place where the latter performs their main activity. The COMI of the other individuals should correspond to the place of usual residence (Cfr. Lima Pinheiro, Luís, *op. cit.*).

Some Portuguese judgments stress the importance of avoiding the possibility of transferring assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position. However, such jurisprudence merely refers to Recital 4 of the EIR (which contains that principle) without any kind of analysis or discussion.

# Spain

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FERSINT CENTRAL EUROPE KFT UNIPERSONAL, Ltd, a Hungarian company, filed for insolvency at the Commercial Court of Bilbao (Spain) together with two Spanish companies of the same group.<sup>1</sup> The company filed for the insolvency proceedings in Spain arguing that its COMI was located in Bilbao because the Hungarian company was created to market products developed in the Hungarian factory, which was never built. At that time, the company was led by the parent company in Bilbao.

The judgment established that, pursuant to Art. 3 para 1 of the EIR, COMI was located in Bilbao based on three criteria:

- 100% of the capital was owned by a Spanish company, which was declared insolvent at the Commercial Court No. 2 of Bilbao.
- The social administrator had his residence in Bilbao.
- The commercial relationships, as evidenced by the documentation submitted as part of the application, were undertaken in Bilbao.

This decision is a clear example of the interpretation of COMI for companies in the Spanish jurisdiction.

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A creditor of Mr. Hugo, who was of German nationality but resident in Spain (Benissa, Alicante), filed for his insolvency before the Spanish Commercial Court of Alicante.<sup>2</sup> Mr. Hugo objected to the jurisdiction of the Spanish Court stating that the German courts were competent because he had German nationality. The judgment established that, in accordance with Art. 3 para 1 of the EIR, Mr Hugo's COMI was located in Alicante.

If the insolvency proceedings are related to a natural person, the COMI shall be considered to be located in his place of residence. In the case analyzed, it was shown that:

- Mr. Hugo had his residence in Benissa, as evidenced by the power of attorney of Mr. Hugo.
- Some notifications regarding a lawsuit filed against Mr. Hugo were provided in Benissa to an employee of the debtor.
- The notification of the writ of insolvency was also delivered in Benissa.

- Mr. Hugo had a bank account at a bank of Benissa.
- Mr. Hugo had a telephone line in Benissa.
- Mr. Hugo's wife said in a prior judicial proceeding followed in Germany that her residence was in Benissa. Since no legal separation had been confirmed, it must be assumed that he had the same residence as his wife.
- There was a negative certification of residence of Mr. Hugo established in Germany.

This is an uncommon judgment in Spain since it relates to the insolvency proceedings of a natural person. The special value of this judgment lies in the deep study undertaken by the Court about the facts that should be taken into account in order to determine the COMI of a natural person according to the EIR.

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<sup>1</sup> Commercial Court No. 1 of Bilbao 4 May 2009, Resolution 292/2009.

<sup>2</sup> Commercial Court No. 1 of Alicante 16 June 2008, Resolution 149/2008.

# United Kingdom



The English court was asked to consider applications by a bank for administration orders to be made in respect of two companies (incorporated in Delaware (A) and Jersey (B)), i.e. outside of England and Wales.<sup>1</sup> The main issues for the court were whether the companies had their COMI in the UK for the purpose of the EIR to give the English court jurisdiction, and if so, whether it should make the administration orders. The bank contended that this was the case and as such, the purpose of administration could be achieved in accordance with English statutory requirements.

Both companies did have their COMI in the UK, but the “purpose” of administration could only be achieved in the case of B (and not A). In order to establish a company’s COMI it was necessary to closely analyse both its recent history and present situation. Company “A” had used the address of a London office as its main address up until 2001. Even after this date it still maintained offices there and continued to use that address in correspondence, as well as in its official reports to the US authorities. “A” was by no means a dormant company and there was no evidence that it conducted activities to any greater extent elsewhere than in London.

Equally B had no other active address or place of activity other than London. Thus the court had jurisdiction in respect of both companies. However, there was no real prospect of the purpose of administration being achieved in the case of A. Administration would result in asset stripping which could

not be said to be a rescue of the company as a going concern. Winding up was not likely to achieve any less of a result than an administration order, and the bank was not a secured creditor of A. However with respect to B, a debenture existed which made the bank a secured creditor and therefore an administration order was appropriate.

Particular attention was paid as to where the company conducted its interests on a regular basis and whether this was ascertainable by third parties and creditors (here, London addresses were used).

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In another case, the court was asked to make an administration order in respect of a company (L) and three of its subsidiaries (E, S and M).<sup>2</sup> L supplied British food products to consumers in Spain and was itself supplied by a number of companies based in the UK. S and M had their registered offices in Spain. Each of the companies within the group was likely to be unable to pay its debts as they fell due and needed to be the subject of an appropriate insolvency procedure. In the case of L and E there was no doubt that the appropriate procedure was an entry into administration. The issue was whether England and Wales could be said to be the COMI of S and M so as to give the court jurisdiction to make an administration order in respect of them. Notwithstanding the location of their registered offices, L submitted that the strategic operational and financial management of S and M was conducted in the UK and that the UK was therefore the COMI.

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<sup>1</sup> Re Ci4net.com Inc, [2005] BCC 277.

<sup>2</sup> Re Lennox Holdings Plc, [2009] EWHC B11 (Ch).

The court concluded that it had jurisdiction to open main proceedings and administration was the appropriate procedure in respect of S and M. The fact that these two companies had their registered offices in Spain created a rebuttable presumption that Spain was the COMI. While control by a parent company elsewhere was not sufficient to rebut the presumption, S and M were controlled by their boards of directors from the UK. Neither company had a commercial undertaking that was separate from that of L; their board and management meetings were held in the UK; their accounts were prepared by English auditors; and their financing and administration was conducted in the UK through English suppliers and directors and with English funding. That was sufficient to rebut the presumption. Here, the court concentrated on the “head-office functions” test. This was an unopposed application and the question arises whether the result might have been different otherwise?

It was alleged that a bank (B) incorporated in Antigua and Barbuda had been involved in a fraudulent “Ponzi” scheme operated by an individual (S) and his associates.<sup>3</sup> The United States Securities and Exchange Commission (“SEC”) brought proceedings in the US against S, B and others alleging fraudulent breaches of securities law and obtained the appointment of (R) as the “worldwide receiver” of the assets of those defendants.

The US Department of Justice (“DOJ”) issued a letter of request to the UK authorities pursuant to a bilateral treaty requesting assistance by way of restraint of the assets of S and B in the UK. Pursuant to that request the SFO obtained without notice a restraint order against those named in the letter of request. (B) was then ordered to be wound up by the High Court of Antigua and Barbuda and (L) were appointed joint liquidators. Competing office-holders were therefore appointed.

Both L and R applied for recognition of their respective proceedings in the UK in order to gain control of the assets of B located in the UK (on the basis that there was no connection with the EU, the application was made under the Cross Border Model Law). One of the main issues was which jurisdiction ought to be considered B’s COMI.

The court ruled that:

- (i) The relevant COMI was the COMI of B.
- (ii) Since B’s registered office was in Antigua, its COMI was presumed to be Antigua, in the absence of proof to the contrary.

- (iii) The burden of rebutting the presumption lay on R.
- (iv) This presumption could only be rebutted by factors that were both objective and ascertainable by third parties.
- (v) What was ascertainable by third parties had to be what was in the public domain, and what a third party could learn in the ordinary course of business.

Applying that test, the presumption was not rebutted.

Mr Justice Lewison back-pedalled on his previous decision in *Re Lennox*, holding that the “head office functions” test is actually the wrong test. Lewison J followed the test that had previously been set down in *Eurofood* (i.e. what is objective and ascertainable to third parties).

The proper course therefore was to start with the presumption of COMI based on the registered office address. A non-exhaustive list of relevant issues to be considered was (in no order of importance):

- who are the companies creditors/customers and where are they based?
- under what law does it contract with creditors/customers?
- where do its banking relationships take place?
- where do customers contact/ correspond with the company?
- where is its head office?
- from where does it conduct business?
- where are its employees based?
- where are directors based?
- where are shareholders based?
- where is its management based?
- where do board meetings take place?
- where are administrative and accounting functions carried out?
- where are the majority of its assets based?
- where are the main bank accounts of the company based?
- where are the annual accounts filed?
- Where are the auditors based?

In another case, (H), a company registered in Luxembourg, was set up as the finance company for a group of companies.<sup>4</sup> H suffered substantial losses and the directors of H had taken steps to relocate the business to London as part of a restructuring strategy. The chosen route for restructuring H was via a non-consensual restructuring of its debts by way of a pre-packaged administration sale (which resulted in approximately EUR 1.5 billion of subordinated debt being left behind in an insolvent company).

<sup>3</sup> *Re Stanford International Bank Ltd (in liquidation)*, [2010] EWCA Civ 137.

<sup>4</sup> *Re Hellas Telecommunications (Luxembourg) II SCA* [2011] EWHC 3176 (Ch).

The court held that the company's COMI had been migrated to England: therefore, under Art. 3 para 1 of the EIR, the Court had jurisdiction to make the administration order. Among the factors relevant to the Court's decision was that:

- the corporate general partner was an English registered company;
- UK resident individuals had been appointed to the supervisory board of H's immediate parent;
- a new head office had been opened in London, where correspondence was sent and board meetings held;
- all creditors were notified; and
- the company's restructuring negotiations had taken place in England.

The Court paid particular attention to where the company's restructuring negotiations had taken place when determining its COMI. At all times however, the key point was whether the information was already the public domain which a typical third party would learn through their dealings with the company (which could not be "hidden" changes within the company's organisation).

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Initially the English law position was very much that COMI was taken to be the location of the registered office. This assertion however, has since been substantially overtaken and judicial thinking has evolved, as set out below. Following the decision in *Re Lennox Holdings plc* [2009] B.C.C 155, the test became the 'head office functions' test; that the COMI would be the place where functions such as board meetings, internal accounting, treasury management, human resources, IT systems etc., took place (see also *Re Enron Directo SA*<sup>5</sup>, *Re Daisytek-ISA Ltd/ISA Daisytek SAS*<sup>6</sup>, *Crisscross Communications*<sup>7</sup>, *MG Rover*<sup>8</sup> and *Collins & Aikman*<sup>9</sup>).

Six months later, the Stanford case came before the courts and again the test was slightly amended. Mr Justice Lewison, who also heard the Lennox case, stated: *"Simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, is the wrong test. The way in which the ECJ approached recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in Lennox Holdings on the basis accepted by Jacobs A-G in § 114,*

*I now consider that I was wrong to do so. Pre-Eurofood decisions by English courts should no longer be followed in this respect. I accept Mr Zacaroli's submission that COMI must be identified by reference to factors that are both objective and ascertainable by third parties."*

Therefore, the position became where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties and creditors as such. This is of course consistent with the ECJ approach in *Eurofood*.

The significance of the 'objective and ascertainable' provision is based on the principle that insolvency is a foreseeable risk and thus as the collective insolvency process will be for the benefit of creditors, it should, therefore, be based in a place known to the debtor's actual and potential creditors. It follows then that the most important third parties, as referred to by Mr Justice Lennox and recital 13 of the EIR, are the creditors.

Regardless of the cases that have considered the COMI issue, the relevant factors to be considered are still not definitive. However, judicial guidance is to start with the presumption based on the registered office and then exhausting other factors including: who the company's creditors are and where there are based; where do its banking relationships take place; where do customers correspond with the company; where are the company's employees and directors based.

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The response to forum shopping in England and Wales has seen the courts willing to entertain a variety of EU registered entities seeking to utilize a perceived more flexible restructuring and insolvency jurisdiction. However the courts are equally unwilling to sanction cases where it is demonstrable that the attempted 'relocation' of COMI is a 'fiction' or 'sham' by refusing to be drawn into assuming jurisdiction.

Implicit in this approach is the view that genuine relocation, in exercise of EU law freedoms, which occurs before the filing of any request to open main proceedings in the country from which the debtor has migrated, cannot safely be restricted by UK domestic law, even where the debtor's principal motivation for moving COMI is to take advantage of more favourable or flexible insolvency laws.

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<sup>5</sup> *Re Enron Directo SA* (unrep., 4 July 2002)

<sup>6</sup> *Re Daisytek-ISA Ltd/ISA Daisytek SAS* [2003] BCC 562

<sup>7</sup> *Crisscross Communications* (unrep., 20 May 2003)

<sup>8</sup> *MG Rover* (unrep., 14 August 2006)

<sup>9</sup> *Collins & Aikman* (unrep., 15 July 2005)

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