

The interpretation by French courts of the EU COMI notion

A EU perspective

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Courts of EU Member States increasingly apply the Council regulation on insolvency proceedings (the "Regulation"²) to groups of companies³.

Pursuant to this case law⁴, courts of the Member State in which the group's headquarters is situated find that the centre of main interests ("COMI") of the group's foreign subsidiaries is also located in that Member State and open main proceedings against these subsidiaries. Accordingly, the COMI is the basis of jurisdiction for opening main proceedings against the parent company as well as the subsidiaries located in other Member States.

Numerous significant issues arise out of the application of the Regulation to groups of companies. The European Court of Justice (the "ECJ") , in its judgment of May 2, 2006 rendered in connection with the Eurofood matter (the "Eurofood Judgment")⁵, has settled certain of these issues. In particular, the ECJ has provided rules for interpreting the COMI notion when the registered offices of the subsidiary and that of the parent company are situated in two different Member States.

Until recently, French case law on this issue only related to the recognition in France of foreign main insolvency proceedings opened against the group's French subsidiaries⁶.

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² Council regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings. OJ 2000 L 160, p.1.

³ The Regulation does not address the situation of groups of companies and does not regulate the relationship of parent company and subsidiary. Each company subject to insolvency proceedings is a debtor in its own right. Opinion of Advocate General Jacobs delivered on September 27, 2005, ECJ, Case C-341/04 (the "Opinion").

⁴ As to this case law, see e.g. Damman, *L'évolution du droit européen des procédures d'insolvabilité et ses conséquences sur la procédure de sauvegarde*, *Lamy Droit commercial* (March 2005) ("Damman I"); Raimon, *Centre des intérêts principaux et coordination des procédures dans la jurisprudence européenne sur le règlement relatif aux procédures d'insolvabilité*, *Journal de droit international* (2005), p. 739 ("Raimon").

⁵ ECJ, Case C-341/04, May 2, 2006.

⁶ Court of Appeals, Versailles, September 23, 2003, JCP Ed G (2003), p.89 (the "Versailles Daisytek Decision"); Court of Appeals, Versailles, December 15, 2005, Dalloz (2006), p. 379 (the "Versailles Rover Decision"). On June 27, 2006, the Supreme Court denied the petition lodged by the public prosecutor against the Versailles Daisytek Decision. Cass. com., June 27, 2006, N° 03-19863. The

In February 2006, however, the Nanterre Tribunal of Commerce, following the trend developed by courts in other Member States, applied for the first time in France the notion of COMI to foreign subsidiaries of a group whose parents companies were situated in this country. A similar decision was rendered by the Lure Civil Tribunal in March 2006⁷.

This article analyses the salient features of these decisions with a special emphasis on the judgments rendered by the Nanterre Tribunal of Commerce⁸. It examines in particular the Tribunal's holdings in light of the interpretation rules set forth by the ECJ in the Eurofood Judgment.

Background

Article 3(1) of the Regulation vests jurisdiction to open insolvency proceedings with the "court of the Member State in the territory of which the center of a debtor's main interest is situated". The Regulation, however, does not define the notion of COMI. Recital 13 of the Regulation only mentions that 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".

In the case of a company, Article 3(1) lays down a presumption. The place of the registered seat is "presumed to be the centre of its main interests in the absence of proof to the contrary". The presumption, therefore, is rebuttable. The question revolves around which conditions are required to rebut this presumption.

Determining the debtor's COMI entails major consequences. The proceedings opened in the Member State where the debtor's COMI is situated are main proceedings. Main proceedings produce universal effects. They apply to the assets of the debtor situated in all the Member States⁹. Under Article 4 of the Regulation, the law of the Member State where main proceedings have been opened shall in principle be the law governing the insolvency proceedings and their effects. Pursuant to the Eurofood Judgment, such proceedings must be recognized by the courts of the other Member States without the latter being able to review the jurisdiction of the court of the

Supreme Court ruled inter alia that failure to hear the personnel's representatives does not constitute a manifest violation of the fundamental right to be heard which the persons concerned by the insolvency proceedings enjoy.

⁷ Tribunal de Grande Instance, Lures, March 29, 2006, N° 56/06, unpublished (the "Lure Decision").

⁸ The Nanterre decision contains a detailed analysis of the factual underlying circumstances of the case and explains in detail the course of reasoning followed by the Tribunal. The Lure Decision is concise and even, on certain issues, elliptic. See infra note 38.

⁹ Article 17 of the Regulation. Eurofood Judgment, Pt. 28.

opening State¹⁰. Subsequently, courts of other Member States where the debtor has secondary establishments may only commence secondary proceedings. Such proceedings are restricted to the assets of the debtor situated within the territory of that Member State¹¹ and are necessarily liquidation proceedings¹².

The notion of COMI has given rise to various and often conflicting interpretations. In particular, certain French commentators have expressed the view that the notion should be restrictively construed and based on the law of the Member State where the registered seat is situated. The debtor's COMI should remain the debtor's registered seat except when such a seat is fictitious or has been fraudulently transferred shortly before the proceedings have been commenced¹³.

Conversely, the courts of other Member States (especially, UK, German and Italian courts) have generally followed a liberal approach and tend to interpret the COMI notion in an extensive manner¹⁴. Illustratively, in the *Daisytek* matter, the High Court of Leeds opened main proceedings against the French and German subsidiaries of the *Daisytek* group on the grounds that the COMI of these subsidiaries was located in Bradford. The High Court rebutted the Article 3 presumption in finding that the headquarter functions were centrally carried out in Bradford.

Likewise, the Italian courts have very broadly construed the notion of COMI as shown by the *Parmalat* decision. On February 19, 2004, the Parma Tribunal commenced main proceedings against Eurofood ISFC Limited ("*Eurofood*"), an Irish subsidiary of the Italian company *Parmalat Spa*¹⁵. The main purpose of *Eurofood* was the provision of financing facilities for companies in the *Parmalat* group. The Parma Tribunal examined where *Eurofood* was actually managed. The Tribunal found that *Eurofood's* COMI was situated in Italy since "the vital management centre of the

¹⁰ *Eurofood* Judgment, Pt. 44. The ECJ refers to Recital 22 of the Regulation whereby "grounds for non-recognition should be reduced to the minimum necessary". A Member State, however, may refuse to recognize insolvency proceedings where effects of such recognition would be manifestly contrary to that State's public policy. Article 26 of the Regulation.

¹¹ Article 27 of the Regulation.

¹² Article 3(3) of the Regulation.

¹³ See e.g. Khairallah, note under the *Versailles Daisytek* Decision, *Rev. crit. DIP* (2003), p. 664. As to the fraud issue, cf., Par. 1.2.1. of the note issued by the French Ministry of Justice relating to the coming into force of the Regulation, *Official Journal* (July 30, 2003), p. 12939 (the "Ministry Note"). In support of this strict interpretation, certain commentators also referred to the ECJ decisions regarding the freedom of establishment principle which had opted for the incorporation system. See Menjucq, *Les groupes de sociétés*, in *L'effet international de la faillite*, p. 169 ("*Menjucq Groupes de Sociétés*").

¹⁴ See generally, Damman I. In certain cases, the presumption laid down in Article 3(1) was even challenged and treated as only one of the possible considerations to be taken into account for determining the COMI. Raimon, p. 746.

¹⁵ See Auricchio and Passalacqua, *Conflict of Jurisdiction in the Application of Council Regulation (EC) 1346/2000 on Insolvency Proceedings: the Eurofood Case*, *IBA Newsletter Insolvency and Creditors' Rights*, October 2004, p. 13 ("*Auricchio*").

company" coincided with the headquarters of Parmalat Spa¹⁶. The Italian Tribunal asserted jurisdiction on the grounds of various substantive elements. It mentioned *inter alia* that two members of Eurofood's Board of Directors with decision making powers were Italian managers of Parmalat Spa.

Previously, Bank of America NA, the main creditor of Eurofood, had applied to the High Court in Ireland for winding up proceedings against Eurofood. On March 23, 2004, the Irish court ruled that, in accordance with Irish law, the insolvency proceedings had been commenced against Eurofood on the date when this application had been submitted. In addition, the Court found that Eurofood's COMI was situated in Ireland and therefore that such proceedings were main proceedings.

The Irish Court's determination as to COMI focused on Eurofood third-party creditors' and where such creditors could consider Eurofood's COMI was situated. The Court referred to Recital 13 of the Regulation as well as certain UK cases on COMI under which the most important third parties were creditors and mentioned the elements which could be ascertainable by third parties. It found that there was no evidence that creditors considered Eurofood was managed from Italy.

The Italian Tribunal, therefore, followed an approach based on actual control while the Irish Court had adopted an approach relying on the appearance to creditors. This difference of approach was coupled with a difference of purposes between the Italian and the Irish proceedings. The Italian proceedings aim at the restructuring on a worldwide basis of all the entities of the Parmalat group while the Irish procedure constituted wind up proceedings more favourable to the Eurofood creditors (mostly bondholders)¹⁷. The Italian administrator appealed to the Irish Supreme Court which referred this matter to the ECJ for a preliminary ruling.

The Eurofood Judgment

The guidelines provided by the ECJ in this decision should lead to a restrictive interpretation of the COMI notion and bring to an end the liberal approach.

The ECJ recalls that the COMI concept is specific to the Regulation. As a result, the Court rules that it should have an autonomous meaning and, therefore, be interpreted in a uniform way, independently of national legislation¹⁸.

¹⁶ *Id.*, p. 14.

¹⁷ Cf. Damman, note under the Eurofood Judgment, *Dalloz* (2006), p. 1757 ("Damman Eurofood").

¹⁸ Eurofood Judgment, Pt. 31. The resort to national legislations might have led to conflicting decisions by the courts of the various Member States and thus increases the risks of legal uncertainty for third parties which the ECJ wishes to avoid.

The ECJ's course of reasoning as to the determination of COMI rests on two considerations¹⁹. Firstly, the ECJ lays down the basic underlying principle: "each debtor constituting a distinct legal entity is subject to its own court jurisdiction"²⁰. It further notes that the Regulation does not purport to determine as such the jurisdiction rules applicable to companies which are part of a group²¹. The COMI of each company, therefore, must be determined on a case-by-case basis.

Secondly, after having mentioned Recital 13 of the Regulation, the Court states that the COMI notion must be identified by reference to criteria that are both objective and ascertainable by third parties²². The ECJ highlights the importance of objectivity and possibility of ascertainment which are necessary to ensure legal certainty and foreseeability in determining a court's jurisdiction and, as a result, the applicable law²³.

On this basis, the ECJ rules that the presumption laid down in Article 3(1) of the Regulation whereby the COMI of a subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable to third parties "enable it to be established that an actual situation exists which is different from that which locating at that registered office is deemed to reflect"²⁴. The control by a parent company situated in another Member State of the subsidiary's economic choices is not sufficient as such to rebut the presumption²⁵.

Therefore, to this effect, it must be demonstrated that the place where the company actually conducts its business is not situated at its registered seat, this situation may be ascertained by third parties and given the circumstances of the case, these third parties did not have reasons to rely on the apparent situation resulting from the location of the registered seat²⁶.

The following examines *inter alia* how these considerations have been addressed in the Emtec decisions rendered by the Nanterre Tribunal.

¹⁹ Rémetry, note under the Eurofood Judgment, Rev. Sociétés (2006), p. 379 ("Rémetry").

²⁰ Eurofood Judgment, Pt. 30.

²¹ Eurofood Judgment, Pt. 3.

²² Eurofood Judgment, Pt. 33. The ECJ, however, does not provide details as to what these criteria should be.

²³ Id.

²⁴ Id. Pt. 37.

²⁵ Eurofood Judgment, Pt. 36.

²⁶ Rémetry, p. 360.

The Emtec case

The Emtec group distributed media-related products such as portable hard disks, CDs and DVDs. The group included subsidiaries in Spain, Austria, Germany, Poland, Italy and the Benelux. The holding entity was situated in the Netherlands for tax reasons. The group, however, was controlled by three French companies.

On February 1, 2006, the Nanterre Tribunal commenced reorganisation proceedings (redressement judiciaire) against each of the three controlling French companies (Emtec International SAS, Emtec France and Emtec RPS International SAS) upon the request of the holding entity's legal representatives.

Subsequently, further to the request of certain foreign subsidiaries' managers, the Tribunal also commenced reorganization proceedings against each of those subsidiaries on the grounds of Article 3 of the Regulation²⁷.

The findings and holdings of the decisions regarding these various subsidiaries are substantially similar. The following focuses on the judgment regarding the Belgium subsidiary²⁸.

The distinction between registered seat and COMI

After having recalled that the presumption contained in Article 3 may be rebutted, the Tribunal emphasizes that the COMI may be different from the location of the registered seat. In this respect, the Tribunal notes that the international mobility of companies has considerably increased over the years and that the place of the registered seat is not necessarily where the company exercises its main activities or where its central administration or its main assets are located²⁹.

To support the distinction between the notion of COMI and that of registered seat the Tribunal refers inter alia to

- the numerous decisions rendered by courts in other Member States interpreting in an "extensive manner" the COMI notion. The Tribunal observes in this respect that the

²⁷ Under Article L. 621-2 of the Commercial Code, bankruptcy proceedings commenced against one company may be extended to other companies provided that these various companies have intermingled their assets. In this instance, the Tribunal did not pronounce such an extension. Cf. Vallens, note under the Emtec Decision (as defined in note 27, infra), Dalloz (2006), p. 797 ("Vallens"). This commentator suggests that establishing this intermingling in the case of companies situated abroad might have raised particular difficulties. Id.

²⁸ Tribunal of Commerce, Versailles, February 15, 2006, Dalloz (2006), p. 793 (the "Emtec Decision").

²⁹ Emtec Decision, p. 794.

other courts refer to a combination of factors such as the headquarters functions concept³⁰;

- the decisions rendered by the same Tribunal³¹ and the Versailles Court of Appeals in the Rover case recognizing in France the UK decisions which opened main proceedings against the French subsidiary of the Rover group³² further to a headquarters functions approach³³.

The Tribunal also emphasizes that a "pragmatic" approach enables the grouping of different main proceedings with a single court and that this grouping is desirable since, as a result, a global reorganisation plan for the entire group may be worked out³⁴.

In requiring a combination of factors, the Tribunal refuses to consider the existence of a group as a sufficient condition to rebut the Article 3 presumption. The Tribunal examines whether this combination exists in the present case in proceeding with a detailed factual analysis of how the Emtec group operated³⁵. For this purpose, it scrutinizes the functions carried out by each of the three French companies and for each subsidiary, the location of certain of its activities.

Strategy determination and implementation, financial, accounting and human resources management for all the group entities as well as the creation, design and marketing of the products distributed by these entities were centralized at and carried out by Emtec International. The service agreement whereby central costs

³⁰ Id. The Tribunal mentions that the headquarter functions concept rests inter alia on the following elements: the law governing the main contracts, the location of the Board meetings, the location of the business relationships with clients, the place where the group's commercial policy is defined, the existence of prior authorizations from the parent company to enter into certain financial transactions, the situation of the bank creditors, the centralized management of the purchasing, human resources, accounting and information technology policies.

³¹ Tribunal of Commerce, Nanterre, May 19, 2005, Dalloz (2005), p. 1787.

³² Versailles Rover Decision, cited supra, note 5. In December 2005, the Versailles Court of Appeals upheld the judgment rendered by the Nanterre Tribunal recognizing in France the opening in the UK of main proceedings against the French Rover subsidiary. The Nanterre Tribunal noted that in its daily management activities, the French subsidiary did not enjoy any autonomy in the fields of financing, accounting, commercial or marketing decisions and human resources.

³³ The Tribunal, however, sets aside the French theory regarding the distinction between the company's registered seat and its "actual seat". The Tribunal declares that the notion of actual seat is limited to the place where the company's central administration is situated (i.e., usually, where the management bodies meet). Impliedly, this notion is too restrictive for the purpose of interpreting Article 3 of the Regulation. The Tribunal also observes that the COMI notion should be construed in an autonomous manner (and, therefore, independently from the domestic laws of the Member States). Emtec Decision, p. 794.

³⁴ Id.

³⁵ Jault-Seseke & Robine, note under the Emtec Decision, Bulletin Joly Sociétés (2006), p. 583 ("Jault-Seseke").

were recharged to the various group entities was governed by French Law. Definition of commercial and chain distribution policy, purchase and inventory administration, payment of goods and re invoicing to the various group entities, control of sales forecasts, cash flow management for all the group entities was centralized at and carried out by Emtec France. Emtec RPS purchased on a global basis the professional sector products for all the group's foreign entities³⁶.

As to Emtec Benelux, the Tribunal observes that the company was managed in France. The President of the company and its general manager were both French residents. Supply activities were carried out from France. Emtec Benelux' commercial policy (including pricing, product positioning, marketing policy) was established in France. Specifications and the product design were prepared by Emtec International. The cash flow needs of Emtec Benelux were determined on a weekly basis further to a telephone meeting between the group's financial manager and that of the subsidiary³⁷. Further to this analysis, the Tribunal concludes that there exists a "combination of factors" which leads to situate in France the COMI of Emtec Benelux^{38 39}.

The Tribunal's analysis, however, is not limited to identifying the place of the headquarters functions. For COMI purposes, the Tribunal will further examine whether this place was ascertainable by third parties.

Ascertainability by third parties

The Tribunal expressly refers to Advocate General Jacobs' opinion whereby the creditors must be able to ascertain the risks in case of insolvency and, in particular, the risks resulting from the law governing the proceedings⁴⁰. As stated by the Tribunal, the creditors must know where the company is managed when they decide

³⁶ Emtec Decision, p. 793.

³⁷ Emtec Decision, p. 794.

³⁸ Emtec Decision, p. 795.

³⁹ In the Lure Decision, the Lure Tribunal commenced main proceedings against the company Energotech SARL, the Polish subsidiary of the French company Esac Eurocooler. In its judgment, the Lure Tribunal defines the COMI notion as the "effective centre of management of the debtor's business, ascertainable by third parties". Lure Decision, p. 3. The Lure Tribunal also adopts a combination-of-factor approach. The Tribunal notes that the President and Vice President of the Polish company were managers of the holding company and that such managers resided in France. The parent company provided technical assistance to the subsidiary and was directly in charge of the distribution of its products, the preparation of its budgets, the follow-up of its shipments and its exchanges with clients. The parent company managed the technical documentation, the clients' specifications and manufacturing norms for both enterprises. The parent company's orders represented 93% of the subsidiary's sales revenues. On the basis of these data, the Lure Tribunal finds that the subsidiary was totally subject to the technical and commercial orientations set by the parent company's managers and more generally, to the industrial, commercial and financial policy of this company. Lure Decision, p. 4.

⁴⁰ Opinion, Par. 118.

to extend credit. The question then revolves around how the ascertainability element should be established. Advocate General Jacobs had stated in his opinion that in a group context, the control of a company in view of designating or removing its managers is not sufficient as such to rebut the presumption of Article 3 but reserved the situation where a more "intensive" control would be exercised. The Nanterre Tribunal concludes therefrom that in order to determine the COMI, one must refer to a "very intensive control visible by third parties"⁴¹.

In this instance, Emtec Benelux' employees, duly represented and examined by the Tribunal, confirmed that the management of the company was carried out in France⁴². In addition, the analysis of the group's operating process made by the Tribunal supported the employees' statement.

As to the other creditors, the Tribunal declares that the total lack of Emtec's financial autonomy is evidenced by the triggering of this company's insolvency which itself resulted from Emtec International and Emtec France's insolvencies. According to the Tribunal, "without a doubt", Emtec Benelux' creditors were aware that upon extending their credits, the repayments of their claims would depend upon the financial situation of Emtec International and Emtec France and consequently, could fully foresee that the COMI of this company would be situated at Emtec International's and Emtec France's registered seats⁴³. Arguably, this practical application of the ascertainability test may give rise to reservations in this instance. Indeed, the Tribunal assumes on the part of these creditors an awareness of the group's internal operating process which they did not necessarily have in dealing with the company⁴⁴. This holding evidences the difficulties which the ascertainability requirement may raise under certain circumstances⁴⁵.

Ascertainability is the first limitation to the combination-of-factor approach set by the Tribunal to protect third parties' interests. In addition, to ensure the protection of local employees and creditors, the Tribunal recognizes the possibility of opening secondary proceedings against the subsidiary in the Member State of its company's registered seat.

⁴¹ Emtec Decision, p. 794. In support of its argumentation, the Nanterre Tribunal also refers to Point 27 of the ECJ Staubitz-Schreiber judgment which emphasizes the importance of legal certainty for creditors who have to assess the risks to be assumed in the event of the debtor's insolvency. ECJ, Case C-1/04, January 17, 2006.

⁴² Emtec Decision, p. 794.

⁴³ Emtec Decision, p. 795.

⁴⁴ See Jault-Seseke, p. 583. Contra, Vallens, p. 798.

⁴⁵ Although ascertainability by third parties is mentioned as a requirement of the COMI notion, the Lure Decision does not specifically discuss this issue. The Lure Tribunal, however, notes that the clients of the Polish subsidiary directly dealt with the departments of the parent company and, occasionally, the French company negotiated contracts on behalf of the subsidiary. Lure Decision, p. 4. The Tribunal does not address the situation of the Polish company's employees.

Secondary proceedings against the subsidiary

The Tribunal observes that the pragmatic approach it follows allows the opening of secondary proceedings in view of better taking into consideration local creditors' and employees' interests⁴⁶. In support of this position, the Tribunal refers to the various decisions rendered by Austrian and German courts in the *Daisytek*, *Automold*, *Hettlage* and *Rover* matters whereby such courts had opened secondary proceedings against group's subsidiaries notwithstanding the main proceedings commenced abroad against these companies. The Tribunal also mentions the decision recently rendered by the Versailles Court of Appeals in the *Rover* matter in which this Court admitted the possibility of commencing secondary proceedings in France against the French *Rover* subsidiary (which was subject to main proceedings in the UK)⁴⁷.

On the basis of this case law, the Tribunal holds that it rests with the French judicial administrator or the local creditors to request the commencement of secondary proceedings against *Emtec Benelux* in Belgium. Such proceedings will enable the local creditors and employees to enjoy the benefit of their local privileges and ranking and social status. In addition, as noted by the Tribunal, such creditors may still lodge their claims in the main insolvency proceedings⁴⁸.

Local creditors, however, may not necessarily be aware of the commencement of the main proceedings. In view of notifying these creditors and in conformity with the Regulation, the Tribunal orders that its decision be published and registered in France and the concerned Member States⁴⁹.

It should be noted that this Tribunal's ruling strongly differs from the opinion initially expressed by certain French commentators on this issue. These commentators had denied that secondary proceedings might be opened against a subsidiary by the court of the Member State where this company has its registered seat⁵⁰. They argued that the definition of establishment as provided in Article 2 (h) of

⁴⁶ *Emtec Decision*, p. 795.

⁴⁷ Under the circumstances of this particular case, the Versailles Court of Appeals refused to commence secondary proceedings against the French *Rover* subsidiary. The Court generally held that the opening of secondary proceedings is appropriate only if such proceedings are useful. The Court noted that, according to the UK trustees' statements (which were not contradicted by the other parties), the proceedings were evolving without difficulties, such proceedings were preserving all the parties' interests and a single procedure allowed the continuation of the debtor's activities over a longer period and permitted to coordinate all the sales transactions over the entire European territory. The Court also observed that, according to the UK trustees, secondary proceedings would unnecessarily increase costs and formalities. *Versailles Rover Decision*, p. 380.

⁴⁸ *Emtec Decision*, p. 795.

⁴⁹ Articles 21 and 22 of the Regulation.

⁵⁰ See e.g. Urbain-Parléani, *La faillite des sociétés*, *Rev. Sociétés* (2005), p.101; Menjucq, note under the Versailles *Daisytek Decision*, *JCP Ed G* (2004), p. 92. Cf. also, Ministry Note, Par. 1.2.2.

the Regulation could only relate to a branch, an agency or offices but not to a legal entity. This position, however, was subsequently seriously disputed. Indeed, Article 2 (h) which defines an establishment "as any place of operations where the debtor carries out a non transitory economic activity with human means and goods" does not contain any reference to the notion of legal entity⁵¹. Also, the ECJ had previously admitted that a legal entity could be treated as an "establishment"⁵².

The contribution of the Emtec decisions

Clearly, the Emtec decisions constitute a significant contribution to the French case law regarding the application of the Regulation to groups of companies.

The value of this contribution should be considered in light of the two main goals that the Regulation purports to achieve. These goals have been recalled by the ECJ in the Eurofood Judgment⁵³. Firstly, the Regulation purports to ensure that "cross-border proceedings ... operate efficiently and effectively" and its rules aim at securing "coordination of the measures to be taken regarding an insolvent debtor's assets"⁵⁴. Secondly, the Regulation seeks to ensure "legal certainty and foreseeability" as to the determination of the court commencing bankruptcy proceedings and consequently, the law applicable to the proceedings⁵⁵.

Efficiency and effectiveness

One shall note that in commencing main bankruptcy proceedings against the various subsidiaries, the Nanterre Tribunal avoids the multiplication of separate procedures (and the ensuing costs and delays⁵⁶) which might have adversely affected the effective treatment of the group's financial difficulties and hampered the finding of a global and optimal solution for the group's rescue⁵⁷. As observed by the Tribunal, given the imbricated structure of Emtec Benelux and its financial and commercial dependency vis-à-vis the group, only the opening of French reorganisation proceedings would offer the possibility to prepare a reorganisation plan for the group taken as a whole to the benefit of the employees and the creditors⁵⁸. The Tribunal emphasizes in this respect that the value of the Emtec group resided in its distribution network, at the European level, with the main chain stores. Significantly,

⁵¹ Menjucq Groupes de Sociétés, p. 173.

⁵² ECJ, Case 218/86, December 9, 1987.

⁵³ Cf. Damman Eurofood, p. 1737.

⁵⁴ Eurofood Judgment, Pt. 48.

⁵⁵ Id., Pt. 33.

⁵⁶ Vallens, p. 798.

⁵⁷ Damman Eurofood, p. 1754.

⁵⁸ Emtec Decision, p. 795.

the main creditors and employees of the Emtec's foreign subsidiaries had expressed a preference for the opening of such proceedings.

Legal certainty and foreseeability

In examining whether a "very intensive" control exercised over Emtec Benelux was "visible" by third parties, the Tribunal addresses the ascertainability element set out in Recital 13 of the Regulation. It confirms that ascertainability by creditors is indeed a necessary condition for determining where a COMI is situated. In this regard, the Tribunal imposes a necessary limitation to the headquarters functions approach. As emphasized by Advocate General Jacobs, the concepts of transparency and objective ascertainability are required factors to guarantee legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings⁵⁹.

Likewise, the possibility admitted by the Nanterre Tribunal to commence secondary proceedings in the Member State where the subsidiary is located⁶⁰ constitutes an essential element to secure certainty and foreseeability in regard to the determination of the law applicable⁶¹. Further to Article 28 of the Regulation, the law of the Member State where secondary proceedings are commenced will apply to these proceedings. The application of local laws further to the commencement of secondary proceedings will help to preserve the rights of local employees⁶² and local creditors⁶³. The law governing the main proceedings may indeed offer less protection than the one that these persons may enjoy under local laws. Impairment of employees' rights may be of particular importance in cases where, under local laws, employees may play a significant role during the bankruptcy procedure, employee claims enjoy a particularly favourable treatment or employment must be protected⁶⁴. Likewise, the treatment of creditors' claims under the law applicable to the main proceedings may be less favourable than the one that local creditors may enjoy under local laws. For

⁵⁹ Opinion, Pars. 118 and ffs.

⁶⁰ The ECJ impliedly recognizes this possibility in the Eurofood Judgment. See Fasquelle, note under the Eurofood Judgment, *Bulletin Joly Sociétés* (2006), p. 924 ("Fasquelle").

⁶¹ The opening of main proceedings against the foreign subsidiaries without secondary proceedings would otherwise lead to the application of a single law to the entire group and, therefore, create the uncertainty and unforeseeability which the ECJ has condemned in the Eurofood decision. Fasquelle, p. 925. Also, secondary proceedings reduce the risks of law shopping. *Id.*

⁶² See generally, Gaillot, *Employees and bankruptcy proceedings, a French perspective*, 2006, paper presented at the 2006 III Annual Conference ("Gaillot").

⁶³ Generally, in assessing their debtor's financial situation, creditors do not take into consideration the creditors of affiliated companies or the possible application of a foreign law. See Vallens, p. 796.

⁶⁴ Under Article 10 of the Regulation, the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. The *lex concursus* may nevertheless govern various significant employee-related issues. See Gaillot, p. 18 and ffs.

example, inter-company debts may be subordinate vis-à-vis other creditors' claims under local laws while such claims would rank on an equal footing with unsecured claims under the law governing the main proceedings⁶⁵.

In addition, further to secondary proceedings, creditors whose collateral is located in the Member State where the foreign subsidiary's registered seat is situated will be subject to the constraints of bankruptcy law. Indeed, under Articles 5 and 7 of the Regulation, main proceedings do not affect the rights of secured creditors or holders of a reservation-of-title clause when the collateral is situated in another Member State at the time of opening of the proceedings. Therefore, failing secondary proceedings, such creditors who are not subject to the restrictions resulting from the main proceedings could exercise their foreclosure rights without limitation and thus defeat the principle of equal treatment of creditors⁶⁶.

To the extent possible, however, secondary proceedings must be harmoniously articulated with the main proceedings. Such an articulation does not generate specific problems when the main proceedings are also winding up proceedings⁶⁷. Secondary proceedings, because of their liquidation nature, may conflict however with the main proceedings when such proceedings purport to restructure the group's activities and jeopardize the adoption of a global (and optimal) solution for their rescue and/or disposal⁶⁸. Various techniques may be suggested to alleviate this difficulty. For example, Article 34(1) of the Regulation provides that where the law applicable to secondary proceedings allows for these proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings may propose such a measure himself. Also, in case of main proceedings opened in France and consisting in reorganisation proceedings, the debtor's activities may be transferred to a third party. Conceivably, the receiver of the main proceedings or the local creditors may request the commencement of secondary proceedings after the sale of the group's activities has been ordered⁶⁹. The proceeds derived from the disposal of the local assets would then be distributed in conformity

⁶⁵ Damman Eurofood, p. 1757. See e.g., in the Rover matter, the situation of the local third party creditors in Germany. Damman, note under the Versailles Rover Decision, Dalloz (2006), p. 384.

⁶⁶Jault-Seseke, p. 586. Commentators had emphasized that most frequently, the foreign subsidiary does not have any assets in the Member State where main proceedings are opened and that, without secondary proceedings, these creditors could freely satisfy their claims against the subsidiary's assets situated in another Member State. See Menjuq Groupes de sociétés, p. 172.

⁶⁷ Fasquelle, les faillites des groupes de sociétés dans l'Union Européenne: la difficile conciliation entre approches économiques et juridiques, Bulletin Joly Sociétés (2006), p. 167.

⁶⁸ See e.g. Fasquelle, p. 925. Given the likely increase in the future of secondary proceedings against French subsidiaries, this commentator suggests that the section for France of Annex B to the Regulation be modified and include reorganisation proceedings. Annex B sets out the list of proceedings admissible as secondary proceedings. The current version of the French section only includes liquidation proceedings *stricto sensu*.

⁶⁹ Damman Eurofood, p. 1757.

with the law governing the secondary proceedings. This approach would both ensure centralisation of the main proceedings and legal certainty for local creditors^{70 71}.

Limits

The balancing approach of the Emtec decisions has been approved by various commentators⁷². These decisions, however, evidence the difficulties which the guidelines set by the ECJ to determine a COMI may generate in practice.

The objective criteria to be taken into account for determining a COMI remain imprecise. Also, the definition of COMI may be easily applied in case of highly integrated groups (like the Emtec group⁷³). This definition, however, does not appear tailored to less integrated groups with several management centres situated in different Member States⁷⁴. In addition, determining in practice the existence (or not) of the ascertainability condition may rest on subjective findings in certain instances⁷⁵ and, therefore, be possibly subject to inconsistent interpretations. This subjectivity factor partly defeats the very purpose of this condition which is to guarantee certainty and foreseeability for third parties.

⁷⁰ Id., p. 1758.

⁷¹ As illustrated by the Rover case, the possibility (or threat) of secondary proceedings may lead to negotiated solutions equivalent to those achieved through actual proceedings. See Damman, note under the decision of the Nanterre Tribunal of May 19, 2005, *Dalloz* (2005), p. 1792 ("Damman Rover Tribunal"). In this matter, the UK judge opened main proceedings against the French subsidiary of the Rover group. Under Article 4(2)i) of the Regulation, the law of the Member State where the proceedings have been opened determines the rules governing the distribution of proceeds from the realisation of assets and the ranking of claims. AGS, i.e. the French institution guaranteeing payment of employee claims in case of bankruptcy, could have been inclined to seek the commencement in France of secondary proceedings in order to benefit from the particularly favourable French ranking of employee claims and satisfy its claims against the French assets. The UK trustees, however, sought to avoid secondary proceedings in France and, as a result, the liquidation of the French subsidiary. The trustees would then have lost control of the proceedings. *Damman Rover Tribunal*, p. 1791. The UK judge authorized the UK trustees to hold in escrow an amount equivalent to the one which would have been due to the employees working in France in case of French liquidation proceedings. These considerations are reflected in the UK judgment where the UK judge noted that failing the escrow solution, liquidation proceedings could have possibly been triggered by the employees working in France and such proceedings would have adversely affected the distribution of the group's assets.

⁷² See e.g. Jault-Seseke, p. 581.

⁷³ The Nanterre Tribunal specifically mentions that the Emtec group was "very highly integrated". *Emtec Decision*, p. 793.

⁷⁴ Vallens, p. 798.

⁷⁵ Rémerly, p. 381.

Given these difficulties, it is anticipated that the definition of COMI will be one of the main issues which the EU Commission will address in its future report on the application of the Regulation⁷⁶.

⁷⁶ Cf. Article 46 of the Regulation.