

INSOL Europe Technical Series

Comparative and International Insolvency Law Central Themes and Thoughts

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Introductory remarks

The first introductory remark regards the basic model of the EU Insolvency Regulation. It has seven Principles:

1. Main insolvency proceedings opened in a member state based on the debtor's centre of main interests ('COMI') have a universal scope;
2. Secondary insolvency proceedings to be opened in other member states (based on the debtor's 'establishment') have a supportive function in relation to the main proceedings;
3. The material effects of the main proceedings are halted when secondary proceedings are opened elsewhere. When this is not the case, the law of the state in which the main proceedings are opened shall not affect certain rights of third parties nor have effect in certain contractual relations, e.g. labour contracts;
4. Any creditor shall have the right to lodge claims in any insolvency proceeding;
5. Dividends in all proceedings are pooled, meaning that dividends obtained in one proceeding are deducted from dividends to be obtained in other proceedings;
6. If by liquidation of assets in any of the secondary proceedings it is possible to meet all claims, the liquidator shall transfer any remaining assets to the liquidator in the main proceedings;
7. When coordinating insolvency proceedings in several member states, the main proceedings have priority.

The second introductory remark relates to secondary proceedings within a European context: Secondary proceedings regard the same (insolvent) debtor as the main insolvency proceedings. The liquidator in the main proceedings has several powers to intervene in the secondary proceedings or change their character, and to align these proceedings in accordance with developments in the main proceedings. The effects of secondary proceedings are restricted to the assets of the debtor situated in the territory of the member state where the secondary proceedings are opened (Article 3(2) and Article 27 of the Insolvency Regulation). The debts of the main estate existing prior to the opening of the secondary proceedings are to be recovered from the assets of the secondary proceedings as well. 'Local' creditors are also allowed to lodge claims in the main proceedings or in other secondary proceedings opened in other member states and both the main and secondary liquidator shall lodge claims in the other proceedings that have already been lodged (Article 32(1)) in the proceedings for which they were appointed (Article 32(2)).

Before addressing a few jurisdictional matters, one may wonder whether the member states' domestic legislation is tailored sufficiently to application of the Insolvency Regulation. One of the issues for the legislators of member states is that of 'Implementation' ('Realisation': putting the Regulation into practical effect by introducing additional procedural rules). With regard to procedural matters it is important that a request for the opening of insolvency proceedings explicitly mentions if it concerns the opening of 'main' or 'secondary' proceedings. In the Netherlands this is stated in Article 4(4) of the Bankruptcy Act. A second question is: must a court look into its international jurisdiction 'ex officio'? In my opinion that is the case. Otherwise a court in another member state may easily doubt whether or not it can open a certain type of proceedings (main or secondary).

Main insolvency proceedings should be registered in a national 'Bankruptcy register', if the debtor has an establishment in the country in question. A problem might occur if a member state has no central registration. In that case, where should registration take place? In the registers of what court (and when)?

A registration system created on a European level is one of the first steps to be taken to stop the confusion that now occurs when a court opens main proceedings without knowing that these types of proceedings have already been opened elsewhere.

Other issues to consider for domestic legislators of member states are the publications (and third party rights) and the co-ordination of main and secondary proceedings. Changes in the legal situation of immovable assets may result in publication in the Public register in the other member state. Adaptation of a national Trade Register may also be required. For instance, if a foreign court with the appropriate international jurisdiction opens main proceedings against a debtor-entrepreneur for which a foreign liquidator is appointed, in which sources (Official Gazette/Newspaper) and in which languages should this be published? These are dull and unspectacular issues, but they are necessary to make the Regulation work, also when it comes to the formal details.

Main proceedings

In theory, the rules with regard to the centre of main interests are simple.

The courts of the member state where the debtor's COMI is situated have international jurisdiction to open main insolvency proceedings. These have a universal scope with the goal of encompassing all of the debtor's assets, no matter where in Europe (with the exception of Denmark) they are located. Recital 13 says that the 'centre of main interests' should correspond to "... the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". For a company or legal person the COMI is the place of its registered office (rebuttable presumption). The courts of another member state shall only have jurisdiction if the debtor possesses an establishment within the territory of that other member state (Article 3(2)). A definition for the term 'establishment' is provided in Article 2(h): "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". The effects of a secondary proceeding are restricted to the debtor's assets situated within the territory of the other member state (Article 3(2)). If proceedings are opened after the opening of the main proceedings no 'insolvency test' will take place in the other state and it must concern winding-up proceedings (Annex B) (Articles 3(3) and 27).

The impact of a COMI decision is enormous. It affects its automatic recognition (Article 16), the determination of the applicable law (Article 4) and the powers of the insolvency office holder (Article 18). Of course there are also consequences for creditors (e.g. Article 20(1)), for courts in other member states (Article 29(a)) and for the coordination of the main and all secondary proceedings (Article 31).

English legal literature seldom expresses interest in the historic development of the COMI definition. A draft description drawn up in German in the year 2000 speaks of "... der Ort, von dem aus der Schuldner hauptsächlich Geschäftsbeziehungen unterhält sowie andere wirtschaftliche Tätigkeiten ausübt und zu dem er deshalb die engsten Beziehungen unterhält", which translates to: "... the place from where the debtor primarily maintains economic relations as well as exercises other economic activities and with which he therefore maintains the closest relationships". Note that an alternative text for recital 13 existed as early as 1999: "The centre of main interests is taken as meaning a place with which the debtor regularly has very close contacts, in which his manifold commercial interests are concentrated and in which the bulk of his assets is for the most part situated. The creditor is also very familiar with that place." Based on this history it can be taken that an 'outside' angle was chosen, with a focus on the (executions of) economic, commercial interests. These descriptions were discussed in the period that Germany and Finland exchanged roles as Chair of the Commission.

To analyse the COMI one should look at all of the elements mentioned in recital 13, i.e. 'place', 'administration', 'conducts', 'interests' and 'third parties'. In this regard I would like to discuss the following judicial considerations:

Eurofood (C-341/04)

“Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different member states, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that 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 by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the member state in which its registered office is situated. By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by that Regulation.”¹

BenQ Holding, District Court Amsterdam, 27 February 2007.²

The case relates to main proceedings in the Netherlands.

The Amsterdam court determined that Holding had a permanent location in the Netherlands, where at least nine employees were active; that there were two managing directors, one of whom was solely authorized according to the extract of the Commercial Register and resided in the Netherlands; and that insofar as creditors were involved with Holding and maintained contacts via OHG in Munich, the creditors in question were part of the group of companies of Holding and BenQ Corporation and as such could not be put on a par with third parties. The deciding factor in these circumstances was the fact that Holding performed activities in the Netherlands ascertainable by third parties from a permanent location with staff, and that it was not simply ascertainable by these third parties that in addition (and perhaps primarily) activities were performed in Munich.

Head office functions versus Contact with creditors

In legal literature on the determination of the COMI there are two schools of thought: the Head office theory versus the Contact with Creditors approach, sometimes also referred to as the Mind of management theory versus the Business activity theory.

In the words of its strongest advocate (Gabriel Moss), the head office functions approach comes down to the fact that any evidence designed to show that the COMI is in a member state other than that in which the registered office is located must demonstrate that the head office functions were carried out in that other state. The place in which ‘head office functions’ are carried out will be the place where activities such as making strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc. are performed.³

The head office functions approach has been followed by several European courts, e.g. in the cases of Hettlage AG & Co KG, Collins & Aikman Corporation and EMTEC. It was also followed in the Eurotunnel case, Trib. de Comm. Paris 2 August 2006 Re Eurotunnel.⁴ In its

¹ For an analysis, see Bob Wessels, The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation, in: 3 European Company Law, August 2006, 183ff.

² For more details, see Bob Wessels, BenQ Mobile Holding BV battlefield leaves important questions unresolved, in: 20 Insolvency Intelligence 2007, 103ff.

³ Gabriel Moss and Tom Smith, Commentary on Council Regulation 1346/2000 on Insolvency Proceedings, with additional commentary by Professor Michael Bogdan, Justice Timo Esko, Professor Ian F. Fletcher, Stuart Isaacs QC, Professor Alberto Piergrosso, Professor Bob Wessels, and Alex Wood, in: Moss, Gabriel, Ian F. Fletcher, Stuart Isaacs (eds.), The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide, Oxford University Press, 2009, para. 8.81.

⁴ Tribunal de Commerce Paris, D. 2006, Jur., p. 2329. The judgment was confirmed by the Commercial Court Paris 15 January 2007, D. 2007, A.J., p. 313, and the appeal rejected by the Court of Appeal Paris 29 November 2007, see Michel Menjuq and Reinhard Damman, Regulation No. 1346/2000 on Insolvency Proceedings; Facing the Companies Group Phenomenon, in: 9 Business Law International, No. 2, May 2008, 145. For a case analysis, see Andrew DeNatale and Geraldine Le Beuze, Eurotunnel plc & Eurotunnel S.A. and Associated

ruling the court refers to the Eurofood judgment and applies an autonomous interpretation – unrelated to national laws – and considers that several facts and circumstances prove that the various companies had their COMI in France. These facts and circumstances include:

- (i) strategic and operative management of the group of companies is discharged by a joint council, based in Paris, consisting of French citizens only;
- (ii) finances and accounting are managed in France;
- (iii) employees and assets are located in France; and
- (iv) all negotiations on debt restructuring took place in Paris.

The High Court of Justice 20 June 2008, Re Lennox Holdings PLC and two Spanish subsidiaries⁵ also followed the head office functions approach:

“What I should concentrate on is the head office functions of the two Spanish companies. It is, I should say, clear that the two Spanish companies do carry on business in the member state where their registered office is situated and consequently the ‘mere fact,’ that its economic choices are or can be controlled by a parent company is not enough to rebut the presumption. That is not what is relied on in the present case. It is not control by a parent company that is relied on in the present case. It is control of the companies themselves by their boards of directors.”

The relevant facts of the case at hand showed that strategic, operational and management decisions were taken in England, the court concluded: “[t]hus the financing of the company, its major decisions and the administration of the company itself is conducted in this country and through English suppliers, English directors and with English funding.”

A recent case in the Netherlands falls within the same category.⁶ The District Court Roermond of 17 November 2008 rebuts the presumption:

- a. non-Dutch companies are part of the Henzo concern that is directed from Holland, more specifically Henzo Internationale Group BV located in Roermond. The consolidated accounts of 2006 also reflect this;
- b. these companies are sales companies with 4 to 8 employees working on the basis of sales orders and reporting directly to their sales managers, who work in the Netherlands. The orders are handled in the Netherlands, including delivery to customers. From 2003 onwards, the production activities have never taken place in Belgium nor in Germany. Since then they are performed in the Netherlands and China, directed from the Netherlands;
- c. in Belgium the subsidiary only has a postal address since the closure of its showroom, whereas in Germany the subsidiary was located in an office building that has been vacated. In fact, in Belgium there is only a postal address at the place of the company’s statutory seat. In line with these developments, the employees work from their home addresses and have laptops and cell phones. Furthermore, the employees receive their directions from the board in the Netherlands.

The Insolvency Regulation has deliberately left out rules for the treatment of multinational groups of companies. Possible solutions for the treatment of multinational groups of companies are: leaving matters as they are and continue national case law (Damman), improve definitions, especially the one relating to the COMI (Moss, Paulus, Ringe) or await the solutions of UNCITRAL and its ‘Enterprise groups’ project. The most notable development was created by the courts and concerns the ‘as if’ proceedings, as I call them, wherein creditors are being treated as if secondary proceedings were opened. The model of the Insolvency Regulation is based on the possibility of having secondary proceedings running parallel to the main proceedings. These secondary proceedings ultimately act as supportive proceedings for the main insolvency proceedings. In legal practice, courts are trying to overcome problems of differences in the ranking of claims under various jurisdictions. For instance, under German, Austrian and

Companies, 2nd August 2006 and 15th January 2007, INSOL International, Case Study Series – 1, November 2008.

⁵ On file with author.

⁶ The District Court Roermond 17 November 2008, JOR 2009/55.

Italian law a loan from a parent company to a subsidiary is subordinated to all other creditors. Under French, Dutch and UK law this is not the case, though. In addition, special privileges for certain creditors sometimes exist, as is the case for employees in France, whereas in other countries there are only limited privileges (the UK) or no privileges at all (Germany). Some courts have treated creditors in Europe ‘as if’ in their respective jurisdiction indeed secondary insolvency proceeding had been opened. Such ‘virtual contractual secondary proceedings’ result in the same treatment of these creditors as they could expect under their national law. In the MG Rover case⁷ the court opened main proceedings against the Rover Group and its subsidiaries in Germany, France, the Netherlands, Belgium, Luxembourg, Spain, Ireland, Italy and Portugal. The court accepted the promise made by the main liquidator of Rover SAS (the French company), which ensured that the French employees would enjoy the same privileges in the main proceedings as they would have received if secondary liquidation proceedings would have been opened in France. An explicit clarification by the Birmingham court of the powers of the liquidator in the form of a supplemental Order sought to address the practical difficulties resulting from the international jurisdiction provision: “I hope that by these means courts in other member states may come to appreciate that the principal objective of the administration is to rescue the relevant national sales companies as a going concern.” Eight supplemental Orders were issued describing the objective of the English main insolvency proceedings and the responsibilities and powers of the administrators, including their power to make payments to the employees of eight EU registered subsidiaries to enable these employees to receive the same monies as they would have received if secondary proceedings had commenced, provided that the administrator thought that such payments were likely to assist the purpose of the administration. Subsequently, the pressure on the employees of national sales companies to commence secondary proceedings or to ignore the primary proceedings was, to a great extent, dissipated.⁸ In the Collins & Aikman case this approach was also followed.⁹ The approach several European courts have taken has been characterized as “a form of ‘procedural consolidation’ which allows for different insolvency procedures but unites them in a single forum, thus avoiding at least some transaction costs and discrepancies; in a way, this represents a ‘step toward’ a group insolvency.”¹⁰

My point of view

Let me explain my point of view regarding the ‘head office functions’ being the decisive factor for the determination of the COMI. Moss and Smith¹¹ interpret the quoted words in the Virgós/Schmit Report, no. 75 (“that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”) to mean that any evidence designed to show that the COMI is in a member state other than that in which the registered office is located must demonstrate that the head office functions were carried out in that other state. I question the validity of this interpretation, as the quoted words – as demonstrated above – only explain the logic of the choice for the presumption. They do not, in

⁷ High Court of Justice Chancery Division Birmingham 18 April 2005 (MG Rover I), 2005 [EWHC] 874; NZI 2005, 467; ZIP 2005, 1610; EWIR 2005, 637.

⁸ See High Court of Justice Birmingham 11 May 2005 (MG Rover II; MG Rover Espana S.A. and seven other companies (Supplemental Orders MG Rover)), NZI 2005, 515. High Court of Justice Birmingham 30 May 2006 (2377/2006), NZI 2006, 416, provides its argumentation that indeed special payments to prevent the opening of secondary proceedings were permissible under domestic English insolvency law. The Dutch District Court ‘s-Hertogenbosch 31 October 2005, LJN: AU5330 (Collins & Aikman Automotive Trim B.V.) considered: “From Essent Network as a State monopolist with a public function it may in all fairness be expected that she does not force Appeal [the liquidator in the main proceedings; Wess.] to take such a possibly damaging step if this in itself does not give Essent Network an advantage. She should act voluntarily as if these secondary proceedings, offering no advantage to her or the estate, already were in place.”

⁹ See High Court of Justice London 9 June 2006, ZIP 2006, 2093; EWIR 2006, 623.

¹⁰ Heribert Hirte, Towards a Framework for the Regulation of Corporate Groups’ Insolvencies, in: European Company and Financial Law Review 2008, 213ff.

¹¹ Moss and Smith, footnote 3, para. 8.79.

my opinion, present an independent criterion for determining the COMI. Moss and Smith go on to suggest that it is more appropriate to focus on the location where the head office functions are carried out than on the location of the head office itself. It can be argued that, with this submission, the authors leave the context of the COMI, being recital 13: the COMI as a connecting factor is the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties. With 'head office functions' the authors seem to suggest the place where 'head office functions' are carried out, which will be the place where activities such as making strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc. are performed. It is my opinion that this approach is reflected in the first part of the recital (conducting administration of interests on a regular basis). However, the recital's condition that the debtor conducts this administration is not accounted for. This anomaly may be overcome (the debtor – based on internal control mechanisms – necessarily has these activities performed by the 'head office'), but there is still a shortcoming in the approach in that it does not take into account the second part of the recital's definition ("and is therefore ascertainable by third parties"). As 'outsiders' of the debtor company, third party creditors generally do not have sufficient insight into most of the aforementioned head office functions. As decided in the Eurofood case, the COMI is the result of objective factors and these factors being (cumulatively) ascertainable by third parties.