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A double lesson from Interedil: higher courts, lower courts and preliminary ruling and further clarifications on COMI and establishment under EC Insolvency Regulation.

European Court of Justice, Judgment 20 October 2011, Case C-396/09, Interedil

The Interedil judgment focuses on two main issues within the judicial cooperation in civil matters. First of all, it allows, on a general ground of the preliminary ruling concerning the interpretation of Article 3, to go more into depth – or, better, confirm – various issues regarding the relations between courts of merits and supreme courts in front of EU law, and, therefor, to affirm the primacy of EU law. Secondly, while it confirms various issues concerning the notion, the interpretation and the acknowledgment of COMI, the judgment provides new elements to have a more clear, univocal and predictable ascertainment of COMI. Some issues still, however, remain unresolved and require further clarifications from the European Court of Justice, mainly with regard to the relations between the principle of freedom of establishment within the EU and Insolvency Regulation.

1. Facts and proceedings of the Interedil case¹.

Interedil S.r.l. was established according to Italian law, and, over the years, acquired several properties in the district of the Bari and of the Taranto Court. On 22 July 1998 Interedil shareholders resolved to dissolve the company and to open a voluntary liquidation proceeding; later on a liquidator was appointed. On 2 July 2001 the shareholders transferred the shares of Interedil to an English company named ATP Konney Ltd.

On 18 July 2001 Interedil shareholders resolved to transfer its registered office from Monopoli (Italy) – which fell within the district of the Italian Court of Bari – to London (England), On 31 July 2001, Interedil liquidator applied for its cancellation from the competent Italian Companies Register (registro delle imprese), on the ground that Interedil activity had ceased in Italy due to the transfer

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¹ The summary of facts described in this article are grounded on the judgments issued by the Court of Bari, the Corte di Cassazione as well as by the ECJ; on the defense statements of the parties involved in the proceedings, which the Author had the opportunity to read (but not on the documents filed by the parties in the said proceedings); on the certificates of the Italian and English registers of companies consulted and described by F.M. Mucciarelli, *Da Monopoli a Londra, cit.*, p. 11.

of its registered office in England². The cancellation was made effective from 5 September 2001. On 23 October 2001, almost two months after the cancellation from the Italian Companies Register, Interedil obtained a registration at the Register of Companies for England and Wales as a foreign company with an address in London, based on the existence, according to English company law, that Interedil had a place of business in England. This legal seat, which was at the same address of ATP Konney Ltd, was subsequently moved twice in London. Subsequently Interedil resolved to transfer to Windowmist Ltd³, against shares of the same Windowmist, part of its business, inclusive of its immovable properties based in Monopoli as well as of , on part of its business, inclusive of its immovable properties based in Taranto, respectively on 14 December 2001 and on 27 February 2002. Both transfer deeds were signed and executed in London and subsequently made public in Italy, in order to register the transfer deed in the competent Italian land register.

On 15 July 2002, the Registrar of Companies for England and Wales declared Interedil to have ceased to have its place of business in England; and, on 22 July 2002, removed it from the said Register.

On 28 October 2003, after more than one year from the cancellation from the English companies' register and following an enforcement proceedings started over Interedil assets in 1998, Intesa Gestione Crediti S. p. A. filed a petition with the Tribunale di Bari for the opening of fallimento proceedings against Interedil⁴. This application started the Interedil case, which occupied Italian courts for more than ten years (and still does at the present time) and is one of the first ones concerning international jurisdiction⁵ under Regulation No 1346/2000 on cross-border insolvency proceedings⁶ (hereinafter also referred to as: “**Insolvency Regulation**”) to have been applied.

2 And based on previous Italian precedents. See Tribunale di Monza 5 April 2002, *Giur. Comm.* 2003, 558. These precedents were overcome by the Corte di Cassazione with judgment 20 May 2005, n. 10606, issued in the *Interedil* case.

3 An English company with registered office in London and a secondary seat in Rome. At the time of the said transfer, Windowmist Ltd was controlled by Canopus Company Ltd, who owned the majority of the shares of ATP Konney Ltd, who controlled Interedil . ATP Konney was cancelled as well by the English register of companies on 1 July 2003, following the cancellation of Interedil from the English register of companies.

4 Intesa Gestione Crediti S. p. A. had started enforcement proceedings over the assets of *Interedil* . Such proceedings was pending at the time the petition for *fallimento* was filed.

5 Prior to this case the ECJ had dealt with international jurisdiction under Regulation 1346 in the following cases: 2 May 2006, Case C- 341/04, *Eurofood IFSC Ltd*, in E. C. R. I-3813 (hereinafter: “*Eurofood*”); 17 January 2006, Case C-1/04 [2006] *Susanne Staubiz – Schreiber*, in ECR I-701, n. 27 (hereinafter: “*Staubiz-Schreiber*”). Following the *Interedil* judgment under comment, the ECJ dealt with the same subject in 15 December 2011, Case C-191/10, *Rastelli Davide & C.* (hereinafter quoted as “*Rastelli*”).

6 Regulation 1346 is widely based on the EC Convention on Insolvency Proceedings, opened for signature in Brussels on 23 November 1995, which failed to come into effect as a result of the British non-cooperation policy. The history of the convention is able to grant an insight into Regulation 1346, providing practical guidance in matters of its interpretation. Among the many comments on Regulation 1346 see: I. Fletcher, *Insolvency in Private International Law*, Oxford Press, 2005, __; Moss, Fletcher, Isaacs, *The EC Regulation on Insolvency Proceedings*, Oxford Press, 2009; Pannen (Ed.), *European Insolvency Regulation 1346*, De Gruyter Recht, Berlin, 2007; C. Paulus, *Europäische Insolvenzverordnung. Kommentar*, 2.Auflage, (2008, Verlag Recht und Wirtschaft, Frankfurt am Main), 292, 2; B. Wessels, *International Insolvency Law*, Kluwer, 2012, 341 ff. M. Virgos, E. Schmit, *Report on the Convention on Insolvency Proceedings*, Council of the European Union, Document No 6500/96/EN (hereinafter: “*Virgos /*

Interedil challenged the jurisdiction of the Tribunale di Bari and on 18 December 2003 filed its defence in such proceedings. On 24 May 2004 the Tribunale di Bari opened the fallimento proceedings of Interedil. The said fallimento order was appealed before the Tribunale di Bari itself on 18–21 June 2004, according to the existing Italian insolvency regulations, on the assumption, among others, that the court of Bari had no jurisdiction, as the debtor's registered office had been transferred to England and that no subsidiary existed in Italy. Based on a request filed by Interedil on 13 December 2003 for a ruling on the preliminary issue of jurisdiction – pending the proceeding for the said fallimento order – on 20 May 2005 the Corte di Cassazione adjudicated on the said preliminary issue by way of order. Specifically, the Italian Supreme Court stated that the presumption in the second sentence of Article 3(1) of Insolvency Regulation could be rebutted as a result of various circumstances and held that the Italian court had jurisdiction.

In 2006, the European Court of Justice (hereinafter: “ECJ”) rendered the well known judgment in the Eurofood case⁷, which provided some criteria in the interpretation of the “center of main interests” (hereinafter: “COMI”), which could be used in the Interedil case as well. Based on this ECJ case, the Court of Bari – within the proceeding following the appeal made by Interedil against the fallimento order – doubted the validity of the Corte di Suprema di Cassazione's finding. In light of the criteria established in Eurofood, on 6 July 2009 the Court of Bari decided to stay the said appeal proceeding and referred certain questions to the ECJ.

Prior to the referral order to the ECJ, on 16 April 2007, the Court of Bari, acting as the judge of the Registrar of Companies – on an application made by the former liquidator of Interedil on 6 December 2006 in order to have registered the shareholders' resolution which appointed another liquidator – judged that the transfer of Interedil registered office from Monopoli to London did not cause the dissolution of Interedil in Italy and, therefore, considered erroneous the cancellation of said company from the register as made on 5 September 2001. Consequently, the Court of Bari revoked the said cancellation, affirming that, at the time of the registration in London, Interedil still existed in Italy.

On 20 October 2011 the ECJ issued the judgment under comment⁸. Following such judgment, the Court of Bari will finally adjudicate on the appeal against the

Schmit Report) which is usually used for interpretation to Regulation 1346, even though it was related to the Convention on Insolvency Proceedings which was opened for signature in Brussels on 23 November 1995. On international jurisdiction within international insolvency law and in the Regulation 1346 see, specifically, P. De Cesari, G. Montella, *Insolvenza transfrontaliera e giurisdizione italiana*, Ipoa (Milan), 2009.

⁷ Comments to Eurofood are numerous. Among others see S. Bariatti, Il regolamento n. 1346/2000 davanti alla Corte di giustizia: il caso Eurofood, in Riv. dir. proc., 2007, pp. 203-219; L. Fumagalli, Apertura della procedura principale, competenza giurisdizionale e riconoscimento della decisione, in Giur. comm., 2007, I, pp. 324-338; F.M. Mucciarelli, Eurofood, ovvero: certezza del diritto formale e incoerenza dei principi, in Giur. comm., 2008, I, pp. 1224-1233; B. Wessels, The place of the registered office of a Company: a cornerstone in the application of the EC Insolvency Regulation, European Company Law, August 2006, volume 3, issue 4, p. 188 ff.

⁸ On the Interedil judgment, see P. De Cesari, Procedura principale e procedure territoriali. Nuovi spunti interpretativi forniti dalla Corte di Giustizia, in Fall. 2012, p. 545; I. Fletcher, The Law of Insolvency. First supplement to the fourth edition, Sweet and Maxwell, 2011, p. 114.; F. Jault-Seseke – D. Robine, Procedure d'insolvabilité: critères et date d'appréciation du centre des

fallimento order of Interedil S. r.l. and affirm or deny Italian jurisdiction on the controversial case. The judgment of the court is expected to be issued in 2013.

The four questions referred to the ECJ for a preliminary ruling focus on two main issues within the judicial cooperation in civil matters. The first three concern the interpretation of the term “the centre of a debtor’s main interests” as stated by Article 3(1) of Insolvency Regulation. In particular the referring court investigates the definition of the term and the factors or considerations decisive for identifying it, the content of the presumption laid down in Article 3(1) and the possible ways to rebut it and, finally, whether certain circumstances existing in the Interedil case are sufficient factors to rebut said presumption. The fourth question, on the contrary, concerns a different topic related to the authority of a national preliminary ruling on jurisdiction (regolamento preventivo di giurisdizione) by the Corte di cassazione and its relation to the right conferred by EU law to any court to refer a preliminary ruling to the ECJ.

2. On the effects of EU law on the relations between higher and lower courts: the general framework.

From a logical point of view the first question to be addressed is the one referred to the ECJ as the fourth one. In fact, by its fourth question the Tribunale di Bari asks “whether EU law precludes a national court from being bound by a national procedural rule under which that court is bound by the rulings of a higher national court, where it is apparent that the rulings of the higher court are at variance with EU law, as interpreted by the Court of Justice”⁹. In other words the referring lower court asks whether it is compelled (by a national rule) to follow the guidelines given by a higher court (in this case regarding the issue of international competence), where it has doubts on the compatibility of such a ruling with EU law.

Firstly, it should be noted that the question raised by the national court did not touch directly on the right of the lower court to refer for preliminary ruling to the ECJ. A textual reading of the preliminary reference leads to understand the question in a way that is quite different from what was ultimately answered by the ECJ and gives it a different – wider – scope. It seems to us that the lower court is indeed asking the ECJ if, in the given case, EU law allows it to divert from the binding interpretation given by a higher court where, in the view of the lower court, the given interpretation is not compatible with EU law, and if the lower court is thus enabled by EU Law to give direct interpretation and applica-

intéréts principaux du débiteur, *Revue critique de droit international privé* 2012, p. 189; G. Montella, *La Corte di giustizia e il COMI: eppur (forse) si muove*, in www.lfallimentarista.it, 2012, p. 1 (web site consulted on 15 June 2012); G. Moss, “Head Office Functions”. Test triumphs in ECJ. *Interedil Srl v Fallimento Interedil Srl* (European Court of Justice, October 20, 2011, *Insolvency Intelligence*, 2011, p. 26; F.M. Mucciarelli, *Da Monopoli a Londra, passando dal Lussemburgo: appunti sull’emigrazione delle società italiane*, in *Giur. Comm.* 2012, II, p. 11; N. Nisi, *Centro degli Interessi Principali e Trasferimento della Sede Statutaria: la Corte di Giustizia dell’Unione Europea torna sul regolamento n. 1346/2000 in materia di insolvenza transfrontaliera*, *Liuc Papers n. 246 Serie Impresa e istituzioni*, 29 febbraio 2012, p. 1; L. Panzani, *La nozione di COMI nella disciplina comunitaria dell’insolvenza transfrontaliera: i casi Interedil e Rastelli*, *Int’l lis* 2012, p. 32; J.L. Vallens, *Transfert du siège statutaire et transfert du centre des intérêts principaux*, *Recueil Dalloz* 2011, p. 2915

⁹ See par. 34.

tion of EU law. Even though some preliminary questions are indeed referred to the ECJ, with its fourth question the Tribunale di Bari hints at the idea that an ‘additional’ preliminary ruling is not really needed. Indeed when referring the preliminary ruling (2009) the ECJ had just pronounced itself in the Eurofood case¹⁰, thus giving much of the guidance needed to correctly apply Article 3 Regulation No 1346/2000.

Notwithstanding this understanding of the question, the ECJ made use of its power to reformulate preliminary questions and approached the relevant topic from a different angle. The question urged by the Tribunale di Bari, touching on the hierarchical relations between national courts and rising clear dangers for its potential interferences in internal legal systems, was thus settled within the more traditional and safe environment of national courts, re-affirming their unfettered right to refer preliminary questions.

The path then followed by the ECJ is a quite traditional and well established one. It is indeed a well-known principle in the ECJ case-law that “the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court”¹¹. Such a principle was stated in far away 1976 in the *Rheinmühlen (I and II)* decisions; and it was then restated in several other occasions, the most relevant for the present case being the *Cartesio* decision in 2008, and the recent *Elchinov* decision in 2010¹².

On a first lecture the case at issue shows in fact several points of contact with the *Elchinov* case, and it is no surprise that both the ECJ and the Advocate General make express reference to (only) such a decision. It is worth underlining, however, that the solution retained by the ECJ in *Interdil* is grounded on a number of precedents, all of which confirm the unfettered freedom and discretion of national courts – any national court, even a lower one – to refer preliminary questions to the ECJ¹³. On a closer view, then, it seems that the closest precedent to the case discussed here is the older *Rheinmühlen* case, where the answer to the present case is already to be found.

That decision originated from a preliminary ruling referred by a German Finanzgericht in a case concerning refunds for export towards non-EC States. On appeal of the judgment rendered by the Finanzgericht, the Bundesfinanzhof had annulled this decision and had sent it back for reconsideration to the same court with its own interpretation of EU law (at that time EC law). Regarding the views of the upper court as being inconsistent with EC law, the Finanzgericht wants the

¹⁰ See it cited *supra*, footnote 9.

¹¹ 16 January 1974, Case 166/73 *Rheinmühlen-Düsseldorf* (II) [1974] ECR, p. 33.

¹² Respectively, besides *Rheinmühlen-Düsseldorf* (II) cit., ECJ 12 February 1974, case 146/73, *Rheinmühlen-Düsseldorf* (I), [1974], par. 3; 16 December 2008, case 210/06, *Cartesio* [2006] ECR 9641, par. 94; 5 October 2010, case C-173/09, *Elchinov*, (unpublished). It should be recalled that, where two decisions are given in the same case, decision No I is the one that is filed first with the Registry, not the one whose decision is first handed down.

¹³ The principle has been affirmed in a number of decisions, some of which do not deal with exactly the same legal question discussed in this paragraph, but still confirm the same approach under many other aspects. See for example: 27 June 1991, Case C-348/89 *Mecanarte* [1991] ECR I-3277, par. 44; 10 July 1997, Case C-261/95 *Palmisani* [1997] ECR I-4025, par. 20; 9 March 2010, case C-378/08 *ERG* [2010] ECR, I-1919, and lastly 22 June 2010, joined cases C-188/10 *Melki and Abdeli* [2010] ECR I-5667, par. 4.

ECJ to solve the controversial issue. In a similar way to what happened now in the Interdil case, also then a national procedural law – § 126 n. 5 of the 1965 Finanzgerichtsordnung – opposes such a right by stating that the (lower) court to which the case is sent back to is bound by the judgment of the higher court. Therefore, the question was put whether such a provision precludes the lower court from referring a case to the Court of justice for a preliminary ruling.

Already in 1976, and not surprisingly, the ECJ gave a negative answer. The legal reasoning is very straightforward and to the point. The Court emphasizes the essential role of preliminary ruling in avoiding divergences in the interpretation of EU law. This aim is ensured by making a means available to the national judge for eliminating difficulties, which may arise from the need to give EU law its full effect. It then follows that “any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary community law”.¹⁴ The Court hence strengthens the unconditional and unfettered right of national courts to make use of such a powerful means and to refer a case for a preliminary ruling whenever the judge perceives that a case pending before it raises questions involving interpretation, or consideration of the validity, of provisions of EU law¹⁵ and thus has the widest discretion in referring matters to the EU Court. Applying this principle to the case at hand, it follows that a rule of national law as the one mentioned before cannot deprive the inferior courts of their power to refer to the ECJ for preliminary ruling. Hence, “the inferior court must be free if it considers that the ruling on laws made by the superior court could lead it to give a judgment contrary to community law, to refer questions to the court which concern it”.¹⁶ Arguing in a different way, and thus restricting access of lower courts to preliminary interpretation, would mean that “the application of community law at all levels of the judicial systems of the member States would be compromised”. The quotation is meant to show how in the early Seventies the ECJ feared that a different solution might prejudice not only the sound interpretation of EC law, but its same application ‘at all levels’.

Facts underlying the recent Elchinov case (2010)¹⁷ are quite similar to the ones just mentioned. On a case where the first instance decision was repealed by the Bulgarian Supreme Administrative Court (the Varchoven administrativen Sad), the lower court re-examined the case and – after having collected more evidence on the controversial issue – was doubtful on the compatibility with UE law of the principles stated by the Supreme court’s decision. It therefore decided to refer a preliminary ruling to the ECJ. Here, too, the question was on the relevance of the national rule (Article 224 of Bulgarian Code of administrative procedure) stating that directions on the interpretation and application of the law given by the superior court were binding on the lower court that would re-examine the case.

14 Rheinmühlen-Düsseldorf (II) cit., par 2 (emphasis added). On the decision see, for all T. Hartley, Article 177 EEC: Appeals against an Order to Refer, in *European Law Review* 1975, 48–50 and R. K., *Journal du droit international* 1976, 198–203

15 It may be noted how the ECJ underlines that “this article gives national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling” (Rheinmühlen-Düsseldorf (II) cit., par. 3, emphasis added; see also in *Cartesio* cit., par. 88)

16 Rheinmühlen-Düsseldorf cit., par. 4.

17 See it cited *supra*, footnote 11.

The Court repeats literally the same argument used in *Rheinmühlen-Düsseldorf* (II) and re-states the widest freedom of (any) national court to refer preliminary questions¹⁸. However, referring to the ECJ would not be enough to grant effectiveness and correct implementation of the preliminary ruling, if the result thereof were to be left unattended. To avoid any (possible) misunderstanding, the Court therefor adds a further step (that, whilst missing in its previous decisions, certainly is not surprising) making clear that its judgment on a preliminary ruling is binding on the national court regarding the interpretation or the validity of EU acts¹⁹. Without saying expressly so, a comparison is thus drawn between the internal superior court's decision and the ECJ decision: while the former can be disregarded, the latter is binding in the national court. The conclusion given to the *Elchinov* case follows smoothly from the abovementioned considerations. The national court, having exercised the discretion conferred on it by Article 267 TFEU, is bound by the interpretation of the provisions at issue given by the Court. Previous rulings of a national higher court that appear inconsistent with that interpretation must be disregarded.

Having recalled these precedents, the solution given in the *Interedil* case is hardly surprising. On the contrary, it fills perfectly into the mainstream of the ECJ case-law favouring a direct and immediate relation of the ECJ with each national court referring the case. ECJ case-law on this point appears to be multi-faceted but altogether consistent and very clear.

As is well known, since early times the ECJ worked tirelessly at shaping the neutral procedural action provided by the old Article 177 EEC Treaty into a powerful tool for the uniform and sound application of EU law, adding new bricks to its construction each time the opportunity arose. The main and innovative core of the new approach was to create a direct link between the ECJ and all and any national court that had the responsibility of applying EU law, no matter how small or low in the national hierarchy. Diverting from what would have appeared the easiest and most traditional approach of searching for the cooperation of other superior courts, the ECJ opted for the revolutionary choice of considering all national courts equal and on the same footing, supporting the correct interpretation and application of EU law wherever this was needed. Needless to say, such equality of footing in the face of UE law was obviously in conflict with the 'inequality' (or, better said, with the different role) underlying the hierarchical organization of national judicial systems.

To reinforce the autonomy so granted to lower courts, the ECJ constantly declared that it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court²⁰. This is true both with regard to the ECJ, which declares to be bound, in principle²¹, to give the

¹⁸ See also the decisions mentioned *supra*, footnote 12.

¹⁹ See *Elchinov*, par. 29, with further references to the previous Case law.

²⁰ A number of judgments state this principle. Besides *Cartesio* cit., par. 67, see ECJ, 26 January 2010, in case C-118/08, *Transportes Urbanos*, par. 25; 31 January 2008, in case C-380/05, *Centro Europa 7*, par. 52; 15 June 2006, in case C-466/04, *Acereda Herrera*, par. 47; 15 December 1995, in case C-415/93, *Bosman*, par. 59.

requested ruling where the questions submitted concern the interpretation of European Union law, regarding other superior national courts.

Consistent with this global strategy is the further step that was recently taken to leave the decision as to whether to withdraw or not the referral entirely to the referring court, even in the case that the relevant order for a preliminary ruling has been reviewed or annulled by a superior court, at least as long as the final responsibility for applying EU law remains with the lower court.

Indeed the issue concerning the effects of the appeal to a superior court of the order for preliminary ruling is one that has been on the table for a long time and is one that over time has developed considerably²². The starting point at the outset in 1962 was the principle of separation of legal systems and respect for internal judicial organization. The ECJ stated therefor that the (at the time: EEC) Treaty does not preclude that orders for preliminary rulings are subject to judicial remedies available under national law and leaves the determination of such remedies to national law²³. Through the years and the case-law, it further assessed that a reference for a preliminary ruling is validly brought before it “as long as the request is neither withdrawn by the court from which it emanates or is not quashed on appeal by a superior court”²⁴. Until recently, the praxis in proceedings pending before the ECJ was to stay the procedure as soon as the Registrar was informed by the national referring court that the order was appealed; the case was then dismissed if the order was eventually quashed by the national superior court. A big role was played by the principle of judicial procedural autonomy – stating that it is for the legal system of each Member State to designate the procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law, provided that such rules are not less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by the EU (principle of equivalence and effectiveness).²⁵ Respecting this principle was however also the easiest way to observe the requirement set by the ECJ that a preliminary ruling is given only for the resolution of a real dispute

21 The ECJ has in fact limited its right to control and eventually consider inadmissible a request for preliminary ruling in the following cases: a) when it is obvious that the ruling sought by that court bears no relation to the actual facts of the main action or its purpose; b) where the problem is hypothetical; c) where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it; or d) when the referring court has not defined the factual and legislative context of the questions it is asking. See, for all, ECJ, 31 January 2008, in case C-380/05, *Centro Europa 7*, par. 53, 57.

22 For literature on this issue prior to *Cartesio*, see D. O’Keefe, Appeals against an order to refer under Article 177 of EEC, in *Eur. Law Rev.*, 1984, p. 87-104; T. Hartley, Article 177 EEC: Appeals against an Order to Refer, in *Eur. Law Rev.* 1975, p. 48-50.

23 ECJ 6 April 1962, case 13/61, *de Geus*, [1962] ECR, p. 50; 12 February 1974, case 146/73, *Rheimmühlen-Düsseldorf (I)*, [1974], p. 139, par. 3.

24 ECJ 30 January 1974, case 127/73, *Belgische radio en televisie* [1974], p. 4; 9 March 1978, case 106/77, *Simmmenthal*, [1978], p. 629 ss., par. 10.

25 This is the formula used by the Court to describe what is known as the ‘principle of procedural autonomy’. See for further references, ECJ 14 December 1995, C-312/93, *Peterbroeck*, par. 12. In legal literature, in addition to the authors cited *infra* note 35, see D.-U. Galetta, *L’autonomia procedurale degli Stati membri dell’Unione europea: Paradise Lost?*, Torino 2009, fostering the thesis that the principle is to be construed as serving the superior obligation to guarantee the primacy and efficiency of EU law, and is thus ‘functional’ to the needs of EU law; G. Vitale, *Diritto processuale nazionale e diritto dell’Unione europea. L’autonomia procedurale degli Stati membri in settori a diverso livello di europeizzazione*, Catania 2010.

and therefor is not admissible when it is used in order to receive advisory opinions on general or hypothetical questions. In fact, where the superior court quashes the order for preliminary reference, (the case may be that) there is no longer a dispute before the referring court. On the other hand, it is easy to see how the principle of procedural autonomy conflicts hopelessly with the need to preserve the efficiency of the preliminary ruling and, through it, to guarantee uniformity in European Union law application²⁶.

With the *Cartesio* decision the ECJ undergoes a “Copernican revolution”²⁷ and searches for a better compromise between the two principles. After having recalled that EU law does not preclude the legal possibility to review the referring order²⁸ – therefor paying lip-service to its previous case-law and to the principle of procedural autonomy of national legal systems – the Court allows for a substantial revirement in its case-law and deprives of all practical effect the allowed revision by a superior court of the order for preliminary ruling, at least as long as this court is called upon to take the final decision and apply EU law²⁹. In fact, the ECJ now states that it is only for the referring court to draw the proper inferences from such judgment and to decide whether it is appropriate to maintain the reference for a preliminary ruling, or to amend or withdraw it³⁰. If the sole responsible of the case is the referring court, the ECJ must, “also in the interests of clarity and legal certainty”, abide by the decision to make a reference for a preliminary ruling as this must have its full effect “so long as it has not been revoked or amended by the referring court”³¹. In conclusion, in the specific case of an appeal of the sole order for reference that leaves the main proceeding in its entirety pending before the referring court, the decision of the superior court is downgraded to a simple ‘qualified opinion’ that the national court can either follow or disregard at its own discretion³².

A logical thread connects *Cartesio* and *Elchinov/Interedil*, the two sets of decisions being different faces of the same principle. The lower court’s freedom to make its own decision on the need for a referral, without feeling bound by a previous decision on the same point of the national higher court, is the direct consequence of the previously stated indifference of that same court to the decision of the superior court reviewing its order for a preliminary ruling. At the core of this approach is the central role of the referring court and its ‘autonomous’ competence – at least as long as this court is called upon to take the final decision and apply EU law³³. As the Advocate General Poiares Maduro empha-

26 J. Ch. Barbato, *Le droit communautaire et les recours internes exercés contre les ordonnances de renvoi*, in *RTDeur.*, 2009, p. 267.

27 J. Ch. Barbato, *Le droit communautaire et les recours internes cit.*

28 *Cartesio op. cit.*, par. 89.

29 The scope of application of the *Cartesio* solution is in fact limited to the specific case that the national procedural rule allows for a limited appeal of the sole order for reference, leaving the main proceeding in its entirety pending before the referring court. This point, implicit from the facts of the *Cartesio* case, was later expressly confirmed by ECJ, order 24 March 2009, case C-525/06, *De National Loterij*, par. 7–11. See also S. Crespi, *Nuove e vecchie questioni in materia di rinvio pregiudiziale alla luce della sentenza Cartesio*, in *Dir. Un. eur.*, 2009, p. 957–958.

30 *Cartesio op. cit.*, par. 96.

31 *Cartesio op. cit.*, par. 97.

32 See also S. Crespi, *op. cit.*, p. 955, highlighting how, after *Cartesio*, the sole effect of a superior court’s review will be to *suggest* to the lower court a new assessment as to the need and opportunity of the referral to the ECJ.

sizes in his Conclusions to the *Cartesio* case, through the central role thus granted to the referring court, all national courts become Community law courts³⁴. This role is a cornerstone of the European judicial system and should be preserved as much as possible. From the EU point of view, the approach ultimately outlined is not only a consistent 'system', but also one that is needed for efficiency and uniformity of European Union law.

3. Effects of *Interedil* on Higher Courts: the implicit pressure for more frequent referrals for preliminary ruling.

Although the solution in the *Interedil* case appears to be in line with previous EU case law and well grounded on EU general principles, its impact on national (melius on Italian, in this case) procedural systems is noteworthy. What makes the difference is the content of the national rule relevant for the case. Article 382 of the Italian civil procedure code poses the principle that, when the Corte di Cassazione states on jurisdiction, it makes a final decision and finds the competent court. The mentioned provision in fact rules the effects of decisions adopted by the Italian Supreme court when ruling on a regolamento di giurisdizione – a special kind of proceedings which is given for the purpose of adjudicating only on jurisdiction and is decided by the sole Corte di Cassazione.

It should first of all be noted that the legal case at issue fits perfectly into the scope of application of the *Cartesio* decision recalled above. In fact, pursuant to Article 41 Italian Civil Procedure Code, the regolamento di giurisdizione refers to the Supreme Court the sole issue of international jurisdiction, while the remaining part of the proceedings is left on the lower court. On the other hand, however, a main difference with this case is to be found in the legal authority of the decision given at the end of this kind of proceeding. Pursuant to Article 382(1) Italian Civil Procedure Code and to the corresponding case law, the authority of these decisions is comparable to the effects of *res judicata*, because the finding is final and binding on the lower court that has the responsibility of the main proceeding³⁵. Besides this, it should be pointed out that when adjudicating on this kind of proceedings, the Court rules in plenary session, thus authorizing the suggestion that these decisions are taken with additional care and competence. Altogether, the result is that the *Interedil* case affects the national judicial system much more than what the previously mentioned precedents do, as it challenges (again) the principle of *res judicata*.

This is not the right venue to examine the delicate issue of the relation between the principle of primacy of EU law and national decisions that, while conflicting with EU law, have nonetheless acquired the final stability accorded by *res judicata*. As is known, the debate was especially strong after the *Lucchini*, *Fallimento Olimpiclub* and *Asturcom* decisions³⁶. Recent comments have underlined

³³ *Cartesio* op. cit., par. 95.

³⁴ Opinion of Advocate General Poiares Maduro delivered on 22 May 2008 [ECR, 2008, p. 9641], who strongly emphasizes how the need for a lower court to interact directly with the Court of Justice is vital to the uniform interpretation and the effective application of EU law. He also stresses how, through the request for a preliminary ruling "the national court becomes part of a Community law discourse without depending on other national powers or judicial instances" (op. cit., para 19)

³⁵ See for example, (comma) Cass. 19 October 2006 n. 22427, in *Giust. Civ., Mass.* 2006, 10.

the peculiarity of these cases, stressing how the need for stability and legal certainty are basic values also in the European Union and how the ECJ – when considering its overall case-law and not limiting the analysis to “ – has mainly endorsed and respected the principle of *res judicata* also within national legal systems.³⁷

Undoubtedly, *res judicata* (including the one acquired by national decisions) is a general principle of EU law. The question as to whether the *res judicata* of decisions providing a material finding should be treated differently from *res judicata* of decisions in purely procedural issues may for the moment be left unattended³⁸. In fact, while declaring formal respect to this principle, the ECJ has shown – and is confirming in the *Interedil* case – that all general principles can be balanced one against the other and be derogated if, under the given conditions, this is appropriate in order to preserve the proper functioning of EU law. In all cases, as convincing as the reported ‘self-restrained’ lecture of this case-law may appear, it is clear that the emotional impact of ECJ decisions touching on *res judicata*, one of the most relevant legal principles under national procedural law, is stronger than the one produced by ‘normal’ decisions. Insofar, even if from a European point of view the *Interedil* case is wholly logical, consistent and also not unexpected, from the national point of view the idea that lower courts can disregard a higher court decision conferring or denying national jurisdiction on it and seek elsewhere another ruling on this same point is hard to accept and a cause of distress for the whole system³⁹.

36 Respectively, ECJ 18 July 2007, case C-119/05, *Lucchini*; 3 September 2009, case C-2/08, *Falimento Olimpclub*; and 6 October 2009, case C-40/08, *Asturcom Telecomunicaciones*. As the main topic of this Article is elsewhere we shall limit ourselves to few legal references, especially from Italian literature, see: P. Biavati, *La sentenza Lucchini: il giudicato nazionale cede al diritto comunitario*, *Rass. trib.* 2007 p.1591-1603; R. Baratta, *La cosa giudicata non limita il principio della primauté ... peraltro espunto dal progetto di riforma dell'Unione europea*, *Giust. civ.* 2007, p. 2659-2662; C. Consolo, *La sentenza Lucchini della Corte di Giustizia: quale possibile adattamento degli ordinamenti processuali interni e in specie del nostro?*, in *Riv. dir. proc.* 2008, p. 225-238; G. Raiti, *Le pronunce Olimpclub ed Asturcom Telecomunicaciones: verso un ridimensionamento della paventata “crisi del giudicato civile nazionale” nella giurisprudenza della Corte di giustizia*, *Riv. dir. proc.*, 2010, p. 677-689; F. Spitaleri (ed), *L'incidenza del diritto comunitario e della CEDU sugli atti nazionali definitivi*, Milano, 2009; G. Vitale, *Il principio dell'autonomia procedurale in due recenti sentenze della Corte di giustizia: i casi Olimpclub e Asturcom*, *Dir. Un. Eur.*, 2010, p. 727-753. Among non-Italian literature see: R. Kovar, *L'incidence du droit communautaire sur l'intangibilité des décisions nationales définitives*, *Chémis d'Europe – Mélanges en l'honneur de Jean Paul Jacqué*, Paris, 2010, p. 203; P. Briza, *Lucchini SpA – Is There Anything Left of Res Judicata Principle?*, in *Civ. - Just. Quart.*, 2008, p. 40; P. Nebbia, *Do the rules on State aids have a life of their own? National procedural autonomy and effectiveness in the Lucchini case*, *Eur. Law Rev.* 2008 p. 427-438; M.F. Orzan, *Ops...the ECJ did it again! The relationship between the principle of effectiveness of EU law and the principle of legal certainty in the Case-by-case approach*, *Eur. Law Reporter*, 2010 p. 63-69; H. Schebesta, *Does the National Court Know European Law? – A Note on Ex Officio Application after Asturcom*, *Eur. Rev. Priv. Law*, 2010, p.847.

37 A. Tizzano, B. Gencarelli, *Droit de l'Union et décisions nationales définitives dans la jurisprudence récente de la Cour de Justice*, in *Dir. Un. eur.* 2010, 797.

38 E.A. Barbieri, *Il regolamento preventivo di giurisdizione, la rimessione del ricorso giurisdizionale amministrativo all'adunanza plenaria ed il diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2011, p. 1366, seems to consider that the two cases should allow for different conclusions. On the contrary, E. D'Alessandro, *L'ordinanza conclusiva del regolamento di giurisdizione capitola dinanzi alla “primauté” del diritto dell'Unione europea*, in *Foro It.*, 2011, p. 549, considering the question from the European level and thus accepting that they receive the same treatment.

Under the special circumstances highlighted before (i.e.: a national remedy/procedure implying review on one single issue but leaving the responsibility of the case with the lower court), the effect of the *Interedil* decision is that lower courts, by means of the special relation that the preliminary ruling creates between the ECJ and themselves, are invested with the peculiar capacity to trigger a review of the decisions of those same courts that are at the peak of their judicial system and that normally have the final word on the review of decisions.

From the point of view of Supreme Courts, these are not only, as all other national courts, subject to EU law and compelled to give it priority, under the supervision of the ECJ. From now on Supreme Courts will be subject to an assessment on the compatibility of their decisions with EU law and, what is even worse, this assessment, even though ultimately made by the ECJ, will be triggered by a lower court. Decades were needed in Italy in order to accept the primacy of EU law over national law. Now that this result is generally widely achieved⁴⁰, a new assumption is made that will be even harder to swallow, whereby it is declared that the highest court's decision, taken in a plenary session and provided under national law with the final effect of *res judicata*, can be simply set aside by a lower court considering for ECJ advice.

The situation looks even grimmer if one considers the other – unexpressed – issue that is underlying the *Interedil* judgment, one that would be able to carry the effects of such a decision even further.

It was already noted that the (fourth) question submitted by the Tribunale di Bari was in fact reformulated by the ECJ, as its literal understanding would have led to a different investigation. As seen, the ECJ answered the doubts of the national court by allowing it to refer a preliminary ruling on the place of COMI. Nonetheless, the question of the Tribunale might have hinted at the possibility that the national court could solve the issue concerning EU law on its own by giving direct application to the relevant EU principles already stated in previous decisions, and disregarding to this effect the ruling given by the Italian Supreme Court on international competence of the Italian courts.

It is interesting to note that the ECJ was faced with exactly the same problem in the *Elchinov* case, where this different possibility was expressly considered by the ECJ. In this case the European Court argued that “the question which [the national court] refers to the Court does not appear to exclude the possibility that [it] might consider adjudicating without making a preliminary reference, departing from legal rulings given in the same case by the higher national court, which it regards as inconsistent with European Union law”⁴¹, nonetheless in that case (as in the *Interedil* case), the ECJ concludes that this is not what the national court is actually seeking “since the national court has made a reference for a preliminary ruling to the Court seeking clarification of the doubts which it has as

39 See in fact the very critical remarks of E.A. Barbieri, *Il regolamento preventivo di giurisdizione* cit., p. 1365, who however speculates on the effects of the *Interedil* decision if a similar case occurred before the Administrative Supreme Court.

40 But see the un-orthodox argumentation provided by the Tribunale di Roma, 23 March 2011 in the *Lucchini* case, after the ECJ preliminary ruling (in *Int'l Lis*, 2011, p. 139, with critical note of G. Raiti, *La forza “di acciaio” del giudicato Lucchini nell’inatteso (temporaneo?) epilogo della vicenda pregiudiziale comunitaria dinanzi al Tribunale di Roma*, p. 140 ss.).

41 *Elchinov* cit., par. 23 (emphasis added).

to the correct interpretation of European Union law”⁴². In other words, the fact itself that the referring court refers for interpretation also other questions, on top of the one concerning the preliminary ruling itself, it is considered sufficient proof of the unwillingness of the lower court to disregard by its own motion the ruling of its own higher court.

The caution of the ECJ should be appreciated. It is also interesting to note that the reported quotation of the Elchinov decision was omitted in the Interedil judgment, even though the referred fourth question would have required the same clarification. Still, legal literature should investigate the issue at hand as it might hide unexplored developments and a potential ‘danger’ for the national judicial system organization. What are the powers/duties of a lower court in the case that a Superior Court – judging in one of the few different cases where its decision, while final, implies reconsideration of the proceedings by a lower court – gave a ruling that is obviously and manifestly conflicting with EU law? The statement made in 1978 in the Simmenthal case, and always repeated since, according to which “a national court which is called upon to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation”, is so well known and strongly established that, if the question was posed, the solution looks clear and unavoidable.

What are the options under these circumstances? It does not look reasonable to hope for a change of direction in the European case-law trend. As was seen, the conclusion that, in the given hypothesis, the lower court is subject only to the European Union and – for it – to the ECJ it is based on well-grounded basic principles and serves fairly well the needs of European law. An acceptable way out should be searched on the national level.

It is suggested that a fair, balanced compromise, able to meet and respect the needs of all parties could be found in a larger use of the preliminary ruling at the proper stage and by placing such a powerful tool in the hands of the Supreme Courts. Higher Courts should recover their leading role also with regard to European Union law and in fact become the privileged counterpart of cooperation and dialogue with the ECJ. Whenever addressed with a case involving EU law, Supreme Courts should put extra care in investigating whether a correct application of the relevant EU rules is given. Questions that did not arise at a previous stage – or that did arise, but were deemed not necessary or unclear by the lower courts – should be referred to the ECJ by the Supreme Courts themselves. As easy as this may seem, it is important to emphasize that this is not what happens at the present time⁴³.

The Interedil affaire is quite a good example in this respect. Indeed, on careful examination, the attitude of the Italian Supreme court could be blamed as being

⁴² *ibidem*.

⁴³ See, for example, the analysis of M. Condinanzi (I giudici italiani “avverso le cui decisioni non possa porsi un ricorso giurisdizionale di diritto interno” e il rinvio pregiudiziale, in *Dir. Un.-eur.*, 2010, p. 295 ss.) on the approach of the Italian Supreme Court to cases involving the application of EU law, and the critical observations of the author on some cases where a very much needed preliminary ruling was omitted. See also a general overview in M. C. Reale, M. Borraccetti, *Da giudice a giudice: il dialogo tra giudice italiano e Corte di giustizia delle Comunità europee*, Milano 2008.

quite superficial. Not only could the Corte di Cassazione have raised the same questions on the proper interpretation of Article 3 Reg. 1346/2001 that were later advanced by the Tribunale. Besides this, one would have probably expected the Italian Supreme Court to stay its proceedings, as in October 2004 the preliminary referral in the Eurofood case was published in the OJEU⁴⁴, given that the questions referred involved the same relevant rule (Article 3, Reg. 1346/2001) and the controversial issue at hand dealt with the similar problem of identifying the centre of main interest of a company having its principal seat abroad, but active in Italy and having properties and relevant assets there. Instead, as it was seen, none of these actions were taken.

The number of cases referred for preliminary ruling by the Corte di Cassazione is of course significantly less than the ones referred by lower courts,⁴⁵ and similar figures are to be found in most other European countries. This situation finds a partial explanation in the obvious consideration that lower courts deal with a higher number of cases than higher courts do; hence, they are faced with a higher number of chances to apply EU law. Still, some perplexities arise if one considers that while lower courts may refer a preliminary ruling without being compelled to do so, higher courts – that is: courts “against whose decisions there is no judicial remedy under national law” – have a legal obligation to do so under Article 267, paragraph 3, TFUE.

On a more careful consideration, therefor, it looks like higher courts are comparatively giving direct interpretation of the relevant rules of EU law in more cases than lower courts do. If this is reasonable in the majority of cases,⁴⁶ it may also conceal a different reason. The legal theory of ‘acte clair’, permitting under strict conditions to derogate to the obligation set out by Article 267(3) TFUE, has special attraction in higher courts, as it gives them the freedom to escape from what could still be felt as a burden and duty. The result is that Superior Courts end up avoiding a referral to the ECJ for preliminary rulings also in cases

44 The national court referral in the Eurofood case was published in 2004 (OJ C 251, 9 October 2004, p. 7). It should be noted that the third question referred to the ECJ sounded pretty close to the case at hand of the Italian Supreme Court, even though the two cases were in effect quite different: “3. Does Article 3 of the said Regulation (...) have the effect that a Court in a Member State other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings? (The sentence began with “Does?”). It may be useful to briefly recall that the Corte di Cassazione rendered its decision on the Italian jurisdiction on 20 May 2005 and the ECJ its decision in the Eurofood case on 2 May 2006.

45 According to M. Condinanzi, *I giudici italiani «avverso le cui decisioni cit.*, p. 305, since its first referral in 1975 to year 2008 (when available data ended), the *Corte di Cassazione* referred only 65 cases (101, if one considers all joined cases). With its average less than 2 cases per year (or little more than 3, if one considers all cases unjoined), the rate is startling low. The situation is similar regarding the *Consiglio di Stato* (the Supreme Administrative Court), that in the same timeframe referred 47 cases (62, if calculated unjointly). The situation here summarized with reference to Italy is quite similar in most EU countries.

46 It should be noted that this is what happens – and indeed ought to happen – in most cases. See for example the previously cited (supra, footnote 28), *De National Loterij* case, where the Belgian appellate court, while recognizing that the court of first instance was fully entitled to raise the question of the compatibility of national rules with EU law, held however that the answer to the referred question was clear. In fact, after examining the national rules in light of a previous ECJ decision, the national appellate court concluded that national rules were compatible with EU law, and adjudicated the dispute between the parties to the main proceedings. As was previously noted, the ECJ approved of such a decision and dismissed the referral.

where this would have been useful and necessary for adjudicating correctly the main proceedings⁴⁷.

There is no need to emphasize – again – the strong need for a sound and loyal cooperation especially at the peaks of the national judicial systems, this point having already been emphasized a number of times. Instead, the attention could be drawn on the fact that the Interedil judgment could be seen in a line of continuity with the *Traghetti del Mediterraneo* decision, promoting and fostering a stronger and tighter judicial cooperation with the Supreme Courts. In this latter case the sanction for violating the obligation to refer to the ECJ for a preliminary ruling was found at the EU level, implying that the State responsibility for damages arose from such a violation. With the Interedil case the sanction for omitting – or not seeing! – a necessary referral is brought at the national level, as it might touch on the authority of higher court decisions and their ability to persuade lower courts that the proposed interpretation of EU law is sound and correct. It might well be that this second level of persuasion will reveal itself more efficient than the first one.

4. On the autonomy of the notion of COMI and other preliminary observations..

This said on the fourth question raised by the Court of Bari to the ECJ, the other three questions in the Interedil judgment deal with the concept and the ascertainment of COMI. The third question, furthermore, deals, as well, with the ascertainment in practice of an “establishment”. A comment to these three questions require to recall the relevance of COMI, how it should be interpreted and a description of its scope.

Under Insolvency Regulation, COMI grounds international jurisdiction of the courts of the Member States⁴⁸ to open main insolvency proceedings⁴⁹, it allows to ascertain the law applicable to the main proceedings, according to Article 4 (1) of Insolvency Regulation, and to localize claims as per Article 2(g) third paragraph.

Insolvency Regulation makes no express reference to the law of a Member State, for the purpose of determining its meaning and scope. COMI, therefore, must be given an autonomous and uniform interpretation throughout the EU, in regard

47 ECJ 6 October 1982, case C-283/81, *Cilfit*, [1982] ECR, 3415. Since its appearance in the *Cilfit* decision, the ‘acte clair’ doctrine has been at the centre of strong criticism. Limiting the references a few authors, see G. Bebr, *The Rambling Ghost of “Cohn-Bendit”: Acte Clair and the Court of Justice*, in *CMLRev.*, 1983 p.439-472; H. Rasmussen, *The European Court’s Acte Clair Strategy in C.I.L.E.I.T. Or: Acte Clair, of course! But What Does it Mean?*, in *Eur. Law Rev.* 1984, p. 242-259. In recent years, see also M. Broberg, *Acte clair revisited: Adapting the acte clair criteria to the demands of the times*, *CMLRev* 2008, p. 383; G.F. Mancini, D. T. Keeling, *From Cilfit to ERT: the Constitutional Challenge Facing the European Court*, in *Yearb. Eur. Law* 1991, p. 1 ss. and the few contributions in the collective volume edited by M. Poiares Maduro, L. Azoulai, *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford Press, 2010.

48 Except for Denmark.

49 G. Moss, *Group Insolvency – Choice of forum and law: the European Experience under the Influence of English Pragmatism*, *Brook. J. Int’l L.*, vol 32:3, 1008 remembers that such concept has been a compromise between the UK approach, based on the “place of registration”; and the “seat” of the company approach, common in all other countries in Europe, except for Scandinavia



to the context of the provision and the objective pursued by the Regulation itself. Interedil confirms this approach⁵⁰, in line with the general interpretation of EU law provided by the ECJ in other areas of law⁵¹ as well as in the Eurofood and the Rastelli judgments⁵², respectively prior and subsequent to the Interedil judgment. The said approach confirms the doubts raised by the Court of Bari on the interpretation provided by the Italian Corte di Cassazione in Interedil, grounded on the opposite idea that COMI has to be interpreted according to the Italian laws and regulations⁵³. It therefore justifies the subsequent decision to refer the question to the ECJ notwithstanding the previous judgment of the Italian Corte di Cassazione, as extensively expressed in previous paragraph 3 of this note.

An autonomous interpretation of COMI requires the understanding of its meaning.

It is well known that Insolvency Regulation lacks a proper definition of COMI⁵⁴. To that extent, ECJ judgments on COMI⁵⁵, inclusive of Interedil, extensively quote Recital 13 of Insolvency Regulation, which highlights the scope of COMI, which corresponds to the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties⁵⁶.

The place where the debtor conducts the administration of his interests on a regular basis should correspond to the debtor's head office⁵⁷, that is where the head office functions are performed. Reference is thus made to the place where activities such as strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc. are performed⁵⁸. The differ-

50 Interedil, n. 42

51 Case C-174/08 NCC Construction Danmark [2009] ECR I-10 567. See also, M. Audit, L'interprétation autonome du droit international privé communautaire, JDI 2004, p. 789.

52 Rastelli, n. 31. Among comments to this case, see H. Leclair de Bellevue, Commentaire de l'arrêt Rastelli rendu par la Cour de Justice de l'Union Européenne le 15 décembre 2011, in http://univparis1.fr/fileadmin/0diplome_M20FIS_2011-2012/Articles_Revue_Sorbonne_OFIS/; L. Panzani, La nozione di COMI nella disciplina comunitaria dell'insolvenza transfrontaliera: i casi Interedil e Rastelli, Int'l lis 2012, p. 37

53 Paragraph 3.3 of the judgment n. 10 606 rendered by the corte di cassazione on 20 May 2005, states, quite obscurely, that this interpretation has to be made "keeping in mind Recital 13 of Regulation 1346", and "with a safeguard of the need for a uniform application, in line with the supranational feature of the said regulation".

54 According to the Virgos Schmit Report, paragraph 75, by using the term "interest", the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers); whereas the expression "main" serves as a criterion for the cases where the said interests include activities of different types which are run from different centers. "Centre", referred to "main interests", may be defined as the place where the debtor maintains the closest relationships.

55 Eurofood, n. 32; Rastelli, n. 31; Interedil, n. 48.

56 Attorney General Juliane Kokott conclusions presented on 10 March 2011, nn. 62–63 describe the process which lead to the present version of Recital 13 of Regulation 1346 and the proposals, which have not been accepted, for defining the factors to be considered when ascertaining COMI.

57 B. Wessels, International Insolvency Law cit., pp. 480–481.

58 G. Moss T. Smith in Moss, Fletcher, Isaacs, The EC Regulation on insolvency proceedings. A commentary and annotated guide, first edition, Oxford Press, 2002, n. 8.39 refer to the Enron Directo Sociedad Limitada SA, High Court 4 June 2002 (unreported) a Spanish incorporated Enron company trading in Spain but whose headquarters functions were carried out in London. A summary of the decision is available at <http://www.iiiglobal.org> (web site consulted on 19 August 2012), European Union, articles, where the Skeleton argument on behalf of the petitioner is published.

ent understanding of “head office” in case of individuals or professionals, independent companies or companies belonging to multinational groups, makes the interpretation of COMI very complex, as the development of case law has shown⁵⁹.

The place where the debtor conducts the administration of his interests on a regular basis needs to be ascertainable by third parties too, in order to allow them, when entering relations with the debtor, to assess their risks in the event of the debtor’s insolvency⁶⁰. This allows them, in the first place, to be ensured with legal certainty and foreseeability about the determination of the court having jurisdiction to open the main insolvency proceedings⁶¹. Also it enables them to be aware of the remedies which may be used against their debtor and of their position vis-à-vis other creditors. Finally, it makes clear what their influence on the administration of the estate could be⁶².

The notion of third parties is a very wide one. Reference is made to both actual or potential ones, as well as certain or contingent creditors⁶³, creditors of a fixed amount or of an amount to be liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion⁶⁴. It also includes the so-called adjusting or non adjusting creditors⁶⁵, where the adjusting ones include financiers and trade suppliers. Further, the non adjusting ones include tort victims or people who extend credit in such a small amount that adjusting their position would simply be uneconomical. Adjusting creditors are usually well informed about a company’s financial situation as well as the preferences of the management. Whereas non adjusting creditors most likely are not that well informed⁶⁶.

It may be discussed whether ascertainability of COMI by third parties should be based on subjective arguments – and, specifically, on a certain percentage of all the creditors or certain creditors being aware of the existence of COMI – or on objective arguments, such as the place known to all the potential creditors⁶⁷. The ECJ did not have the opportunity to answer this question. I think that an objective approach to third parties ascertainment better protects the interest and the position of all the creditors and, therefor, should be preferable⁶⁸, even though it would make more difficult to rebut the presumption under Article 3(1).

59 S. Bariatti, Recent case-law concerning jurisdiction and the recognition of judgments under the European Insolvency Regulation, *RabelZ Bd.* 73 (2009), 629.

60 Staubiz-Schreiber, n. 27.

61 Virgos – Schmit Report, n. 75.

62 Revision of the European Insolvency Regulation. A proposal by Insol Europe, Insol Europe Publications, 2012, 42.

63 Interedil, n. 49.

64 I. Fletcher, *The Law of Insolvency*. Fourth edition, Sweet and Maxwell, 2009, n. 6-005.

65 Financiers and its trade suppliers, therefore adjusting creditors, are likely to be the most important group of potential creditors, in case of a trading company. See High Court of Justice, Chancery Division Leeds 20 May 2004 (Ci4Net.Com Inc); High Court of Justice Leeds 16 May 2004 (Daisytek), quoted by B. Wessels, *The place of the registered office of a Company: a cornerstone in the application of the EC Insolvency Regulation*, *European Company Law*, August 2006, volume 3, issue 4, p. 185.

66 On these concepts see G.F. Schlaefler, *Forum Shopping under the Regime of the European Insolvency Regulation*, *International Insolvency Institute, International Insolvency Studies*, 2010, 25.

67 Virgos – Schmit Report, n. 75; B. Wessels, *International Insolvency Law*, cit, pp. 456–457.

68 B. Wessels, *International Insolvency Law* cit., p. 530.

5. On the location of COMI. The presumption under Article 3(1), second paragraph of Insolvency Regulation and the means to rebut it.

By its second question the Court of Bari asks the ECJ if, in order to rebut the presumption under Article 3(1), second paragraph of Insolvency Regulation, it is sufficient to prove that the debtor company has not carried on any business activity in the State in which it has its registered office (as can be maintained by the ECJ in the then just delivered Eurofood judgment), or if it has to be positively proved that the company did carry on a genuine business activity in a State other than that in which it has its registered office.

Recital 13 of Insolvency Regulation, as well as Article 3(1), second paragraph of Insolvency Regulation assist Member States courts in the resolution of doubts on the location of COMI⁶⁹ regarding the opening of the main proceedings of an insolvent company, if there were to be proceedings in more than one country.. Specifically, Article 3(1) serves as a rule for burden of proof, which lies on the party who wants to displace the conclusion as to the whereabouts of the COMI of a company or legal person that would otherwise follow from its application⁷⁰.

In the Eurofood judgment, the ECJ held that the presumption of Article 3(1) of Insolvency Regulation could be rebutted where “an actual situation exists which is different from that which locating it at that registered office is deemed to reflect”, such as in the case of a “letterbox” company, not carrying out any business in the territory of the Member State in which its registered office is situated⁷¹. The said presumption could not be rebutted where “a company carries on its business in the territory of the Member State where its registered office is situated” and “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 the Regulation”⁷².

Such interpretation of COMI, seemingly too restrictive, has been somehow disregarded by national courts, especially by the English ones⁷³, which went on using the “head office function” approach. In 2010, however, in the Stanford International Bank judgment⁷⁴ an English Court stated that, in order to ascertain the existence of COMI, rather than relying on the strengths of the presumption and the evidence to rebut it⁷⁵ – as expressed by the ECJ in Eurofood – it was important to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer⁷⁶. The Interdil judgment, as well as the subsequent Rastelli judgment⁷⁷, provide an interpretation of COMI consider the said Stanford test and allow a better understanding of

69 G. Moss, Group Insolvency cit. 1007–1008 refers that art. 3(1) comprises two different domestic legal approaches in Europe (“state of incorporation theory” vs. “real seat theory”)

70 I. Fletcher, International jurisdiction, in Moss, Fletcher, Isaacs, The EC Regulation cit., p. 46.

71 Eurofood, n. 35.

72 Eurofood, n. 36.

73 The head office test was used, after Eurofood, by the the Paris Tribunal de Commerce 2 August 2006, Eurotunnel, in www.iiiglobal.org (web site consulted on 19 August 2012).

74 High Court of Justice 3 July 2009 [2009] EWHC 1441 (Ch) available at www.bobwessels.nl, webloc under 2009-09 – doc8. The decision is commented, among others, by B. Wessels, COMI: Are English courts coming-out?, IILR 2010, 2.

75 B. Wessels, International Insolvency Law cit, p. 217.

76 High Court of Justice 3 July 2009 cit, which, in par. 61, quotes the decision made by Chadwick LJ, before Eurofood, in *Shierrson v Vlieland-Boddy* [2005] 1 W. L. R. 3966 (par. 55).

the company's COMI. Specifically, in *Interdil* the Attorney General Juliane Kakott stated, in its conclusions, that the said presumption, as well as Recital 13 of Insolvency Regulation, reflect the intention of the European Union legislature to attach greater importance to the place in which the company has its central administration⁷⁸. This is the place where the debtor conducts the administration of his interests on a regular basis, the place from which the destiny of the company is managed⁷⁹. The said assessment should be based on a large variety of factors to be objectively considered, "in a comprehensive manner, account being taken of the individual circumstances of each particular case"⁸⁰, as well as of their ascertainability by third parties. Based on the now mentioned principles, the *Interdil* judgment held that the presumption contained in the second sentence of Article 3(1) of Insolvency Regulation cannot be rebutted, if the bodies responsible for the management and supervision of a company are located in the same place as its registered office and the management decisions of the company are taken in that place, in a manner that is ascertainable by third parties. The said presumption, however, can be rebutted if the place of the company's central administration is not the same as that of its registered office and this is ascertainable by third parties⁸¹ through objective factors which allow to establish that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. National courts shall therefor consider, to that extent, the existence of factors which are likely to be matters in the public domain⁸² and that are ascertainable by third parties⁸³, based on a comprehensive assessment.

6. On the facts relevant to ascertain COMI.

Courts throughout Europe as well as scholars have extensively discussed about the facts which are relevant for the location of COMI. In its third question referred to the ECJ, the Court of Bari listed certain facts located in a Member State (specifically, in Italy) other than that in which the registered office is situated (specifically, in England). It therefor mentioned the immovable property owned by the debtor company⁸⁴, the execution of lease agreements which the company had concluded and the existence in that Member State of a contract concluded with a financial institution as well as of a lease agreement concluded with another company regarding two hotel complexes. The Court of Bari asked whether these factors could be regarded as sufficient evidence to rebut the presumption that COMI is in the place of registered office, or – in the second

77 Rastelli referred to the possible extension of the effects of insolvency proceedings opened in another Member State (France) against another company established within the territory of that other Member State (Italy).

78 Conclusions of the Attorney General Juliane Kakott on 10 March 2011, 70.

79 Conclusions of the Attorney General Juliane Kakott on 10 March 2011, n. 69. As there is no English version of these conclusions, the text is translated from the Italian version.

80 *Interdil*, n. 52. See F.M. Mucciarelli, *Da Monopoli a Londra cit.*, p. 18.

81 *Interdil*, n. 51; *Eurofood IFSC*, n. 34; *Restelli*, n. 35.

82 And what creditors would learn in the ordinary course of business with the company, excluded these factors which might be ascertainable on enquiry. See High Court of Justice 11 February 2009, Ch. Div. [2009] EWHC 1441 (Ch) *Standard International Bank*.

83 *Interdil*, n. 53.

84 The relevance of the ownership of a building in Italy by a company incorporated in Luxembourg has not been considered relevant for the opening of an insolvency proceedings in Italy by Corte di Cassazione Sez. Un. 28 January 2005, 1734, in *Giust. Civ. Mass.* 2005.

place – to affirm the existence of an “establishment”, according to Article 3(2) of Insolvency Regulation .

With regard to COMI, the ECJ stated that these factors could not be regarded as sufficient to rebut the presumption according to Article 3(1), unless a comprehensive assessment (to be made by the referring court within the pending appeal proceedings against the fallimento order) will make it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of management of its interests is located in Italy. The referring court shall, therefore, compare the facts above recalled (all of whom referring to a COMI in Italy) with any other facts and, among them, the transfer of the registered office in England and sale of the Interedil businesses, , inclusive of immovable properties occurred in England between the end of 2001 and the beginning of 2002 (all of whom referring to a COMI in England).

Another topic that scholars have discussed throughout Europe concerns whether relevance should be given to all historical facts (“all facts theory”) or only to facts existing on the day of the court decision regarding international jurisdiction (“snap shot theory”)⁸⁵. Reference made in the Interedil judgment to an “actual” centre of management and supervision allows to affirm that the ECJ requires the facts which ground the ascertainment of COMI to exist at the time when the application for the opening of an insolvency proceedings has been filed, in accordance to the above mentioned “snap shot” theory. This interpretation is confirmed by the ECJ judgment issued on 17 January 2006 in the case Staubiz-Schreiber⁸⁶, according to which the court of the Member State, within the territory of which debtor’s COMI is situated at the time when the debtor lodges the request to open insolvency proceedings, retains jurisdiction to open those proceedings also when the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened. The Interedil case differs, however, from the Staubiz-Schreiber one. In fact in the Interedil case, one year before the opening of the proceedings for the fallimento order by the Court of Bari, the company had been cancelled from the Italian register of companies, had been registered as a Foreign Company in England and was subsequently removed from the English register of companies, following the cease of all activity. These circumstances required the ECJ to decide to which date the location of COMI had to be considered. The ECJ, to that extent, stated that, in cases like the one under exam, COMI had to be presumed as located in the place of the new registered office, unless the presumption in Article 3(1) of the Regulation is rebutted by evidence that the COMI has not followed the change of registered office; and that criterion should be applied even where, at the date on which the request to open insolvency proceedings is lodged, the debtor had been removed from the register of companies and ceased all activities⁸⁷. As Interedil ceased its business prior to the removal from the English register of companies, the relevant date for the ascertainment of COMI should be the one when Interedil transferred the remaining part of the part of its business in Taranto to another compan , on February 2002.

85 B. Wessels, *International insolvency law*– cit., pp. 497–500.

86 Staubiz-Schreiber, n. 27.

87 Interedil , nn. 56–58.

7. Where is COMI in the Interdil case?

As above mentioned, when the application for the opening of the fallimento proceedings was filed on October 2003, Interdil had already transferred its businesses, respectively in December 2001 and February 2002, inclusive of the immovable property owned by the debtor company, in execution of previously concluded lease agreements. Furthermore, the contracts with a financial institution as well as the one for a lease agreement with another company regarding two hotel complexes had been concluded before the said transfers. But nonetheless these circumstances were not sufficient to prove that Interdil was managed, in a way ascertainable by third parties, in a place different from its registered office and, therefore, to rebut the presumption of Article 3(1)⁸⁸. Which means, according to my opinion, that the COMI of Interdil should reasonably be located at its registered office. To that extent, the Court of Bari shall consider whether the transfer of Interdil registered office in England, following its dissolution in Italy and its subsequent cancellation from the Italian register of companies⁸⁹, has been abusive, as stated by Intesa Gestione Crediti and by the receiver of Interdil; as well as whether the registration of Interdil in England as a foreign company is sufficient, according to Italian law, to establish in England a registered office⁹⁰. If the court of Bari ascertains that no abusive transfer in England of the registered office has occurred and that the transfer was sufficient to establish a registered office in England, it is not unreasonable⁹¹ to predict that the Bari Court will consider the presumption under Article 3(1) of Insolvency Regulation not rebutted and that that the Court of Bari lacks international jurisdiction⁹². The judgment of the Court of Bari could however be different if the Court rebuts the presumption of transfer by evidence that COMI has not followed the change of registered office⁹³.

8. On the facts relevant to ascertain an establishment

By its third question referred to the ECJ, the Court of Bari asks whether certain factors could be regarded as sufficient to affirm the existence of an “establishment” in Italy, according to Article 3(2) of Insolvency Regulation. These factors being the location in a Member State (i.e. Italy) other than that in which the

88 B. Wessels, *International Insolvency Law*, cit., p. 487 states that where there is evidence supporting both arguments – in connection with Member State A or Member State B – the presumption prevails.

89 A cancellation which has been declared invalid in 2007 by the Court of Bari, acting as the judge of the register of companies.

90 Italian regulation are unclear to that extent and do not allow to provide a positive undisputed answer to this question. On this issue see, extensively, F.M. Mucciarelli, *Da Monopoli a Londra*, pp. 14 ff. The requirements for a foreign company to establish a place of business and to do business in England and the conditions for establishing jurisdiction of English Courts are described in I. Fletcher, *The law of insolvency*, cit., p. 960–964.

91 G. Moss, “Head office Functions” Test cit., 126 provides the same conclusion, even though it not based on all the factual evidence highlighted in the present comment to the Interdil judgment.

92 In case of this eventual outcome of the appeal proceedings, Intesa Gestione Crediti shall be entitled to satisfy, at least partially, its claims against Interdil with the outcomes of the enforcement proceedings started in 1998, which has continued, notwithstanding the opening of the fallimento proceeding.

93 Interdil, n. 56, last paragraph. On the relevance of this paragraph see N. Nisi, *Centro degli Interessi Principali* cit., p. 10.

registered office is situated (i.e. England), of immovable property owned by the debtor company, with regard to lease agreements which the company has concluded, and the existence in that Member State of a contract concluded with a financial institution as well as of a lease agreement concluded with another company regarding two hotel complexes. In case of the conditions for ascertaining an “establishment” exist, the Court of Bari should have jurisdiction to open a territorial independent proceedings, according to Article 3 (3) of Insolvency Regulation, as argued by Intesa Gestione Crediti in its subordinate claim filed in the appeal proceedings against the fallimento order.

Article 2 (1) (h) of Insolvency Regulation defines “establishment” as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”. As for COMI, such term has to be interpreted autonomously, with no reference to other definitions provided by national regulations or other EU regulations⁹⁴.

The *Interdil* judgment makes it clear that also the existence of an “establishment” requires certain objective factors to be ascertainable by third parties⁹⁵ and, specifically, locally-established business operations⁹⁶ to be done with a minimum level of organization and a degree of stability necessary for the purpose of pursuing an economic activity⁹⁷. Therefore, the presence alone of goods⁹⁸ or bank accounts does not, in principle, meet the definition of “establishment”⁹⁹.

The *Interdil* judgment does not specify the relevant date for ascertaining the existence of objective factors. Based on the *Staubiz – Schreiber* ECJ judgment, as well as on the interpretation of the majority of scholars¹⁰⁰, the relevant date shall be the one at which the application for insolvency proceedings is filed. On 28 October 2003, the date of the application for insolvency, no establishment of *Interdil* existed any longer in Italy, as part of the businesses by *Interdil*, inclusive of immovable properties, had been transferred since December 2001 and another part on February 2002. Insofar, based on the principles expressed by the ECJ, the said subordinated claim raised by Intesa Gestione Crediti for the opening of independent proceedings, should be rejected by the Court of Bari.

9. Are there any further issues to be investigated with respect to COMI?

The above mentioned arguments lead to the following conclusions.

With regard to COMI, the *Interdil* judgment moves along the lines of Recital 13, confirms *Eurofood* and anticipates *Rastelli*. The ECJ, however, makes refer-

94 N. Nisi, *Centro degli Interessi Principali* cit., p. 11.

95 Virgos / Schmit Report, n. 71.

96 I. Fletcher, *Establishment of the debtor*, in Moss, Fletcher, Isaacs, *The EC Regulation* cit., p. 53.

97 ECJ *Interdil*, nn. 60–62.

98 Such as a holiday home operated by an individual debtor, not rented out to third parties on a commercial basis (I. Fletcher, note to G. Moss, T. Smith, *Place of operations*, in Moss, Fletcher, Isaacs, *The EC Regulation* cit., p. 241) or other individual goods as those described by Wessels, note to G. Moss T. Smith, *Place of operations*, in Moss, Fletcher, Isaacs, *The EC Regulation* cit., p. 242.

99 *Interdil*, n. 64.

100 B. Wessels, *International Insolvency Law* cit., p. 437.

ence, to that extent, the place of the company's central administration, as the place where centre of management and supervision as well as of the management of the company's interests is located; and presumes that where the debtor's registered office is transferred before a request to open insolvency proceedings is lodged, the company's COMI is presumed to be the place of its new registered office.

With regard to the notion of "establishment", the *Interedil* judgment highlights the factual elements required for its better ascertainment, consistently with the conditions required for ascertaining COMI. It looks reasonable that the outcomes of *Interedil*, as well as of the other judgments rendered by the ECJ, will be considered in the revision process of Insolvency Regulation, presently taking place according to Article 46 of the said Regulation.

Certain aspects of COMI ascertainment that are well highlighted in the *Interedil* case too, however, still remain unattended by the ECJ. Among them, the most relevant one include the effects on COMI of transfer of the registered office following the principle of freedom of establishment in the EU but made in a date close to the filing of a request for the opening of an insolvency proceeding. Another relevant question is the one concerning which third parties need to be considered for a proper ascertainment of COMI according to Article 3(1) and of Recital 13 of Insolvency Regulation. No question on these issues has been raised so far to the ECJ, which, as above mentioned, faced the issue in *Interedil* only within an *obiter dictum*¹⁰¹. However, it does not look unreasonable that the increase of cross border insolvencies subsequent to the present financial and economic crisis within Europe and the subsequent increase in the application of Insolvency Regulation by lawyers, receivers and national courts may lead to further proceedings involving such issues in the next future.

101 *Interedil*, n. 56, last paragraph.