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Regulation No. 1346/2000 on insolvency proceedings:

The difficult COMI determination, the treatment of groups of companies and forum shopping in light of the CJEU's and domestic case law, and the modernisation of the Regulation

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1. The European Council Regulation (EC) No. 1346/2000 on insolvency proceedings (the "Regulation") establishes a legal framework for cross-border insolvency proceedings.

2. Since its entry into force in 2002, the application of the Regulation has given rise to extensive literature and case law of the Court of Justice of the European Union (the "CJEU") and of the courts of different Member States.

3. The various difficulties experienced in the practical implementation of the Regulation have led to a process of evaluation and modernisation of the Regulation, which was launched by the European Commission in 2011.[1] This modernisation process is part of a broader analysis carried out by the European Commission on business competiveness and increasing the successful number of reorganisation and insolvency proceedings.[2]

4. Together with the European Commission, the European Parliament has been one of the contributors of this modernisation process. In a resolution taken on 15 November 2011, the European Parliament made recommendations on insolvency proceedings in the context of EU Company law to the Commission, underlining the modernisation of the Regulation (the "EP Recommendations")[3].

5. On 29 March 2012, the European Commission launched a public consultation on modernising the Regulation for interested stakeholders, Member States, other institutions and experts. The purpose of the consultation consisted of assessing the Regulation's implementation problems and examining all possible solutions. In addition thereto, DG Justice commissioned two external studies, an external evaluation of the Regulation jointly carried out

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1 As requested by article 46 of the Regulation. It is provided that no later than 1 June 2012, and every five years thereafter, the European Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation. In April 2011, the European Commission announced that it would make a legislative proposal in 2013, see the paper presented in Amsterdam at the conference "The future of the European Insolvency Regulation" held on 28 April 2011, cited by R. Van Galen, M. André, D. Fritz, V. Gladel, F. Van Koppen, D. Marks QC, N. Wouters, "Revision of the European Insolvency Regulation", Proposal by *INSOL Europe*, INSOL Europe, May 2012, p. 7.

2 European Commission, "The economic impact of legal and administrative procedures for licensing, business transfers and bankruptcy on entrepreneurship in Europe", *Final report*, January 2011. The report of the study is available on the Europa-website of DG justice.

3 European Parliament, "Report with recommendations to the Commission on insolvency proceedings in the context of EU company law", *Report*, 15 November 2011, (2011/2006(INI)).

by two universities (Heidelberg and Vienna) and an impact assessment study conducted by the Consortium GHK/Milieu (the "External Evaluation").[4]

6. On 12 December 2012, the European Commission published a proposal for a regulation of the European Parliament and of the Council amending the Regulation (the "Proposal")[5], which is the last step before the final adoption of a new set of rules amending the Regulation. The Proposal is accompanied by (i) a report from the Commission to the European Parliament, the Council and the European Economic and Social Committee setting out the findings of the External Evaluation on the practical application of the Regulation (the "Report")[6], (ii) the Commission's impact assessment paper describing the issues revealed by the External Evaluation, the solutions proposed and their impact (the "Commission's Impact Assessment")[7] and (iii) a communication from the Commission that invites the European Parliament, the Council and

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[4] Hess, Oberhammer, Pfeiffer, "Study for an evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings", *Study*, published on the Europa website of DG Justice. It is a comparative legal study on the evaluation of the Regulation in 26 Member States which was carried out by the Universities of Heidelberg and Vienna with the support of a network of national reporters. The reports of the studies are available in the Europa-website of DG Justice: http://ec.europa.eu/justice/civil/document/index_en.htm.

[5] European Commission, "Proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings", *COM (2012) 744 final, 2012/0360 (COD)*. For the French comment of the Proposal, see R. Dammann, V. Bleicher, "Le droit communautaire des enterprises en difficulté: état des lieux", *Banque et droit*, October 2013, pp. 40 to 44; Y. Brulard, "Que penser de la proposition de la Commission sur les groups de societies dans le nouveau règlement insolvabilité", *Rev. Proc. Coll.*, September 2013, Study 38; R. Dammann, "Application du Règlement (CE) No. 1346/2000 modifié aux groups de societies", *Rev. Proc. Coll.*, Septembre 2013, Study 37; J. Carriat, "Le projet de réforme du droit eurpéen de l'insolvabilité", *Rev. Proc. Coll.*, Study 33; R. Dammann, V. Bleicher, "En route vers la modernisation du règlement européen relatif aux procédures d'insolvabilité", *JCP E*, No. 20, 16 May 2013, 1275; P. Roussel Galle, "La proposition du règlement No. 1346/2000 sur les procédures d'insolvabilité, entre prudence et audace", *JCP E*, No. 12, 21 March 2013, act. 213; J.-L. Vallens, "La révision du règlement communautaire No. 1346/2000 du 29 mai 2000 sur les procédures d'insolvabilité", *D.*, 2013, pp. 316 ff; L. Idot, "Un nouveau chantier pour les juristes: la révision du règlement procédures d'insolvabilité", *Europe No. 2*, February 2013, alert 6; M. Menjucq, "La proposition de règlement modifiant le règlement (CE) No. 1346/2000 sur les procédures d'insolvabilité: une évolution mais pas une révolution", *Rev. Proc. Coll.*, No. 1, January 2013, study 4; see also for other comments of the Proposal, G. Moos QC, "Reforming the EC Regulation on Insolvency Proceedings 1346/2000 UK Perspective", *INSOL World*, Second Quarter 2013, pp. 12 ff; R. Dammann, V. Bleicher, "French Perspective on the Modernisation of the European Regulation No. 1346/2000 on Insolvency Proceedings", *INSOL World*, Second Quarter 2013, pp. 14 ff; D.F. Fritz, "The New Insolvency Regulation-The European Commission's reply to the Changes in European Insolvency Law, Report on the EIR revision proposals by the European Commission, from the German point of view", *INSOL World*, Second Quarter 2013, pp. 18 ff.

[6] COM (2012) 743 final.

[7] SWD (2012) 416 final.

the European Economic and Social Committee to consider further steps to be taken "to tackle the problems that arise from the disparities between national insolvency laws"[8] (the "Communication").

7. In May 2012, Insol Europe published a proposal for the revision of the Regulation containing practical and innovating rules (the "INSOL Proposal")[9].

8. The Report identifies five areas of concern that need to be addressed amongst which are the need for clarification of the concept of COMI and for a legal framework dealing specifically with the insolvency of companies being part of a group.

9. The most controversial aspect of the Regulation relates to the concept of centre of main interests ("COMI") which triggers the application of the Regulation. The majority of the case law on the Regulation relates to the interpretation and determination of COMI.[10] The absence of a definition of COMI in the Regulation has led to different interpretations by domestic courts.

10. Further, the combination of the European Union law principles on the freedom of establishment with the aim of the Regulation to prevent forum shopping by way of a COMI shift brings about interesting discussions.

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[8] COM (2012) 742 final. In this communication entitled "a new European approach to business failure and insolvency", the European Commission explains that it intends to adopt a European Entrepreneurship Action Plan which would include actions to promote efficient bankruptcy procedures and offer a second chance to financially distressed businesses. It is also currently reflecting on the future steps to be taken to tackle the problems that arise from the disparities between national insolvency laws.

[9] R. Van Galen, M. André, D. Fritz, V. Gladel, F. Van Koppen, D. Marks QC, N. Wouters, "Revision of the European Insolvency Regulation", *Proposal by INSOL Europe*, *op. cit.*

[10] See, for example, CA Versailles, 24 (ch.), 4 September 2003, *SAS Isa Daisytek*, *Rev. soc.*, 2004, p. 891, comm. J.-P. Rémery ; *D.,* 2003, p. 2352, comm. J.-L Vallens ; Cass. com., 27 June 2006, No. 03-19.863, *D.,* 2006, p. 1816 ; *Gaz. Pal.*, 10/12 September 2006, comm. M.-A. Lafortune ; CA Versailles, 9 (ch.), 15 December 2005, SAS *Rover France*, No. 05/04273, *D.,* 2006, p. 142, comm. A. Lienhard ; English High Court of Justice, 9 June 2006, *Collins & Aikman Europe SA* [2005], EWHC 1754 (ch.) ; CJEU, 2 May 2006, case C-341/04, *Eurofood IFSC*, Rec. [2006] ECR I-3813 ; *JCP E* 2006, 2071, comm. J.-L. Vallens ; *D.,* 2006, p. 1752, comm. R. Dammann, V. Marquette, "Insolvabilité transfrontalière des groupes de sociétés : le rappel à l'ordre de la CJCE en faveur d'une interprétation stricte de la notion de centre des intérêts principaux du débiteur", *RDC*, 2006/8, October 2006, pp. 804 ff ; CJEU, 20 October 2011, case C-396/09, *Interedil c/ Fallimento Interedil*, G. Minne, "Arrêt Interedil : la Cour de justice de l'Union européenne clarifie le contenu des notions de 'centre des intérêts principaux' et d' 'établissement' du règlement No. 1346/2000 relatif aux procédures d'insolvabilité", *ALJB*, Bulletin Droit et Banque No. 50, November 2012, p. 63 ; F. Fayot, C. Martins Costa, "Chroniques Droit des sociétés (2006-2012)", *Ann. Dr. Lux.*, 2011, p. 303 ; *D.,* 2011, p. 2593, comm. A. Lienhard and p. 2915, comm. J.-L. Vallens.

11. Moreover, the Regulation does not effectively deal with the insolvency of groups of companies although most disputes concern groups of companies.

12. The first part of this article will provide an overview of the current interpretation of COMI, the main difficulties in determining the appropriate jurisdiction to open proceedings in light of national and European case law and the issues raised by the lack of provisions in the Regulation relating to group companies. It will also highlight the problems of forum shopping and cover the legal and tax implications of COMI shifts.

13. The second part of this article is meant to shed some light on the major amendments of the jurisdiction criteria. Firstly, we will be treating the reviewed definition of the COMI concept for corporations.[11] Secondly, we will analyse the solutions provided for by the Proposal with respect to the problems posed by the debtor's relocation of COMI prior to the insolvency application. Finally, we shall briefly focus on the new rules related to groups of companies and particularly on the interpretation of the COMI concept.

Chapter 1
Regulation No. 1346/2000 : difficulties of interpretation of COMI, application to groups of companies and forum shopping

14. Pursuant to article 3 of the Regulation, the courts of the Member State within the territory of which the debtor has its COMI have jurisdiction to open main insolvency proceedings and it is presumed that the debtor's COMI is located at the place of its registered office. The presumption laid down in article 3 of the Regulation may however be rebutted in the case where it is established that the debtor's COMI is not located in the Member State in which it has its registered office.

15. The opening of insolvency proceedings by a national court within the realm of the Regulation triggers a series of consequences. The law of the Member State of the opening of insolvency proceedings will determine the law applicable to insolvency proceedings, their effects, the conditions for the opening of those proceedings, their conduct and their closure.[12] Further, the

[11] This section will only focus on the major amendments provided by the Proposal regarding the determination of jurisdictional rules for corporations and not for individuals.

[12] Article 4 of the Regulation.

judgment opening insolvency proceedings will, with no further formalities, be recognised and produce the same effects in any other Member State subject to the effects of secondary proceedings that may be opened against the same debtor in any other Member State.

16. As a consequence, a debtor faced with insolvency has an interest in having access to flexible and sophisticated restructuring regimes. The same is likely to apply to some or all of its creditors as well as to the subsidiaries of the debtor.

17. The absence of a definition of COMI has led national courts to adopt a broad interpretation of the COMI concept allowing the relocation of debtors to so-called "insolvency friendly" jurisdictions. Further, the concept of COMI has been used in many instances to justify the opening of insolvency proceedings to groups of companies.

Section 1
The interpretation of the concept of COMI

18. The CJEU has given helpful clarifications on the concept of COMI and the circumstances under which the presumption laid down in article 3(1) of the Regulation may be rebutted on two occasions, the first time in 2006 in its famous *Eurofood*[13] case and the second time in 2011 in its *Interedil*[14] case. The CJEU ruling in the *Staubitz-Schreiber*[15] case sheds light into the objectives underlying the adoption of the Regulation and provides further guidance in determining the date on which the COMI analysis is to be made.

Sub-section 1
Eurofood

§ 1. The scope of the Eurofood decision on the COMI determination

19. In *Eurofood*, the CJEU clarified the concept of COMI by referring to recital 13 of the Regulation that, according to the CJEU, "highlights the scope of that concept". Recital 13 of the Regulation provides 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".

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13 CJEU, 2 May 2006, case C-341/04, *Eurofood* IFSC Ltd.

14 CJEU, 20 October 2011, case C-396/09, *Interedil* Srl c/Fallimento *Interedil* Srl.

15 CJEU, 19 January 2006, case C-1/04, *Staubitz-Schreiber*.

20. The CJEU found that the presumption laid down in article 3(1) of the Regulation whereby the centre of main interests of a company is situated in the Member State where its registered office is situated can be rebutted only if factors that are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from the situation that the registered office is deemed to reflect. The court gave two examples to illustrate its ruling.

21. The first example concerned the case of a "letter-box" entity that does not carry out any business in the territory of the Member State in which its registered office is located. In relation to such an entity, the CJEU considers that the presumption can be rebutted.

22. The second example relates to an entity being part of a group of companies and which carries out its business in the territory of the Member State where its registered office is located but whose economic choices are made by a parent company established in another Member State. The CJEU considers that "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".

23. Despite the reference made by the CJEU to recital 13 of the Regulation, both examples used by the CJEU put the emphasis on the place where the company carries out its "business" and not on the "place where the debtor conducts the administration of his interests on a regular basis" which is the wording used in recital 13 of the Regulation. In our view "carrying on business" and "conducting the administration of interests" are concepts that have different meanings.

24. The report on the convention on insolvency proceedings[16] (the "Explanatory Report"), from which the wording used in recital 13 of the Regulation originates, indicates that the centre of main interests shall be construed as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The report further indicates that by using the term "interests", the intention was to encompass commercial, industrial or professional activities as well as any economic activity, including the activity of natural persons. The term "main" is used to refer to any type of activities exercised from several different centres of interests.

[16] M. Virgos, E. Schmit, "Report on the Convention of Insolvency Proceedings", 3 May 1996, 6500/96 DRS 8 (CFC), p. 51.

25. The report concludes that the centre of main interests is, unless proved to the contrary, the place of the registered office, which normally corresponds to the head office.

26. In *Eurofood*, the CJEU concentrated on examples that demonstrate where the business activities of a company are carried out and are ascertainable by third parties instead of the place where the company conducts the administration of such activities.

27. In a group situation, the parent company or one company within that group, depending on the group dynamic and the consideration as to the level within the group where the lead management should sit, is likely to take the lead and determine the overall policies and management of the activities and businesses of the group.

28. The fact that the CJEU used the term "carrying on business" instead of "conducting the administration of interests" may have been to prevent the application of the Regulation to a group of companies or to make it more difficult in that a mere situation of control should not be sufficient to rebut the presumption laid down in article 3(1) of the Regulation and other elements must be presented, such as the place where the business activity is carried out, which support the fact that the COMI of a subsidiary is indeed situated at the registered office of its parent company. Also, in terms of ascertainability, the CJEU may have considered that third parties would more easily be able to identify the location of the activities of a debtor rather than the place where the administration of the interests is conducted.[17]

29. The use of the term "business activity", however, is unfortunate. It is not in line with the way in which the concept COMI was intended to be construed pursuant to recital 13 of the Regulation.

§ 2. Background to Eurofood : the application of the Regulation to groups of companies

30. At the time of conception of the Regulation, the authors did not anticipate the phenomenon of largely integrated groups of companies nor the cross-border mobility of companies that would emerge as a result of an internal market characterised by the freedom of establishment.[18] Even if they

[17] J.-L. Vallens, "Le règlement européen sur les procédures d'insolvabilité à l'épreuve des groupes de sociétés : l'arbitrage de la CJCE", *JCP E*, No. 27 and 28, 6 July 2006.

[18] M. Menjucq, R. Dammann, "Regulation No. 1346/2000 on Insolvency Proceedings : Facing the Companies Group Phenomenon", *Business Law International*, Vol. 9, No. 2, May 2008, p. 145.

had, the issue would have been to agree on a set of specific rules in relation to groups of companies because of the interests involved, e.g. creditor and employee protection, protection of national companies, etc. and of the absence of harmonisation of national insolvency laws in that respect.

31. Further, at that time, national legislations on insolvency provided for rather simplistic proceedings the only outcome of which consisted of the realisation of the assets of the insolvent company and its liquidation. Nowadays, the tendency is to rescue insolvent companies and national legislations have evolved to provide, for a large spectrum of insolvency, regimes adapted to the needs of groups of companies.

32. It is a fact that most of the issues around the application of the Regulation arise in connection with groups of companies. According to the Commission, "the lack of specific provisions for group insolvency is problematic because it often diminishes the prospects of successful restructuring and reduces the value of the group's assets. An individual group member may not be economically viable outside the group structure because the group is structured in a way that indispensable assets, e.g. intellectual property rights, or activities, e.g. cash management, are pooled in a different member of the group. In such cases, it will be difficult if not impossible to reorganise different group members separately. Similarly, a significant part of the value of a group may lie in the cooperation of its members, e.g. distribution networks tailored to particular production patterns, operational and financial management, or simply business goodwill such as brand recognition. This value is lost when assets and affairs of related group members are liquidated separately rather than as a package".[19]

33. Ever since the adoption of the Regulation, many domestic courts have attempted to tackle this issue. Acknowledging the benefits of group restructurings, certain courts tended to construe the concept of COMI broadly so as to extend their jurisdiction to all members of the group. The most famous examples are Enron, Brac Rent-A-Car, Daisytek, Crisscross, Rover, EMTEC, *Eurofood*, Hettlage, Hulka Werke.[20] The courts applied a head office functions

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[19] Commission's Impact Assessment, p. 15.

[20] M. Menjucq, "D'importantes précisions de la Cour de justice sur l'application du règlement No. 1346/2000 sur les procédures d'insolvabilité", *Bull. Joly Soc.*, 1 July 2006, No. 7, p. 907; D. Fasquelle, "Une nouvelle application controversée du règlement No. 1346/2000 relatif aux procédures d'insolvabilité aux groupes de societies", *JCP E,* No. 39, 29 September 2005; R. Dammann, "L'application du règlement CE No. 1346-2000 après les arrêts *Staubitz-Schreiber* et *Eurofood* de la CJCE", *D.,* 2006, p. 1752; J.-L. Vallens, "Le règlement européen sur les procédures d'insolvabilité à l'épreuve des groupes de sociétés: l'arbitrage de la CJCE", *op. cit.*

test[21] and considered a number of factors, which the French courts refer to as a body of concordant indicia (*faisceau d'indices concordants*). The large interpretation adopted by the European courts is characterised by the variety of factors taken into account to determine the COMI with no particular order of importance.[22]

34. By way of example, in Daisytek[23], the management of Daisytek-ISA Limited, the English holding company of a pan-European reseller and wholesale distributor of electronic office supplies requested administration orders in respect of its European subsidiaries. The court construed article 3(1) of the Regulation in light of recital 13 thereof and found that the Daisytek group was managed and controlled from England so that the activities of the group companies throughout Europe are coordinated by the head office in England. In relation to the French subsidiary, ISA Daisytek SAS, the court further relied on the fact that the French subsidiary received financial support from the holding company. Finally, the court emphasised the importance of the ascertainability of the COMI by third parties and considered that the most important third parties are the potential creditors such as the financiers and trade suppliers. The court found that the contractual relationships with such creditors were negotiated and entered into in England and therefore concluded that the creditors of the group knew that important activities were carried out in England even though certain trade activities were carried out by the subsidiary in France.

35. Similarly, in the *MG Rover Ireland Ltd*[24] case, the English court considered that the COMI of the French subsidiary Rover France SAS was based in England on the fact that "(i) all effective management decisions were taken in England by the English parent or by personnel appointed and supervised by

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21 F. Mélin, "Nouvelles précisions relatives aux notions de centre des intérêts principaux et d'établissement du débiteur", *RLDA*, January 2012, No. 67, p. 18.

22 D. Grasso, B. Kurth, "Les difficultés d'interprétation du Règlement (CE) No. 1346/2000 relatif aux procédures d'insolvabilité : champ d'application et compétence international", *ACE*, No. 6, juin 2009, p. 23 ; F. Mélin, "Nouvelles précisions relatives aux notions de centre des intérêts principaux et d'établissement du débiteur, *op. cit.*

23 High Court of Justice, 16 May 2003, *ISA Daisytek SAS*, note C. Barbé, RDC 8/2004, p. 813 ; J.-P. Réméry, "Un exemple de la delicate application du règlement CE No. 1346/2000 du Conseil du 29 mai 2000 relatif aux procedures d'insolvabilité", *Rev. soc.*, 2003, p. 891 ; J.-L. Vallens, "Première application du Règlement européen sur les procédures collectives : prémières atteintes à l'ordre public", *D.,* 2003, p. 2352.

24 MG Rover Ireland Ltd and other subsidiaries, unreported, 18 April 2005, [2005] EWHC 874 (CHAN) ; CA Versailles, 15 December 2005, *D.,* 2006, p. 379 ; D. Fasquelle, "Une nouvelle application controversée du règlement No. 1346/2000 relatif aux procedures d'insolvabilité aux groupes de societies", *op. cit.*

the English parent, (ii) every subsidiary had at least one UK resident director and half of each of the companies' board meetings were held in England, (iii) the English parent played the key role in terms of budget setting, financial scrutiny and funding and no subsidiary had autonomy in Rover's financial structure, (iv) no subsidiary had an autonomous or independent trading existence, (v) the subsidiaries' main creditor was an English based company within Rover, (vi) the subsidiaries' creditors would look to the English parent for their debts and (vii) the subsidiaries together formed a subsidiary network part of an international group structure; they were not individual discrete commercial undertakings".[25]

36. The first application of the Regulation by a French court was made by the *Tribunal de commerce* of Nanterre in the *EMTEC* case[26] six months before the *Eurofood* decision. The *EMTEC* case initiated an extensive interpretation of the COMI concept in French case law.

37. The *Tribunal de commerce* of Nanterre specifically referred to the findings in the *Daisytek*, *Automold, Hettlage* and *Rover* cases, but also considered the opinion of the advocate-general in the *Eurofood* case. As a result, the *Tribunal de commerce* of Nanterre held that (i) the COMI concept was to be interpreted in light of recital 13 of the Regulation, (ii) the COMI was to be determined by reference to the head office functions, (ii) mere control is not sufficient to establish that the COMI of a subsidiary is located at the registered office of the controlling entity and (iii) in order to ensure predictability for creditors, it must be verified that the head office functions were visible to creditors. In order to determine the place from where the head office functions were carried out, the court applied the method of concordant indicia and looked at the following factors: the board meetings, the law governing the main contracts, the client relationships, the place where the commercial policy was defined, the location of the banks, the centralised management of the sales policy, the employees, the accounting and the IT systems. Although the *EMTEC* case does not use the *Eurofood* terminology, the reasoning of the court is to a large extent in line with the *Eurofood* reasoning.

38. The conclusion of the *Tribunal de commerce* of Nanterre illustrates the concern to achieve a successful restructuring of group companies through coordinated insolvency proceedings. The *Tribunal de commerce* of Nanterre

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[25] J. Marschall, N. Herrod, "EC Insolvency Regulation: mutual trust in operation?", *Pratical Law Company*, 27 June 2005, Resource ID: 2-200-9540.

[26] TC Nanterre, 15 February 2006, *D.*, 2006, No. 11, note J.-L. Vallens, "La maison mère d'un groupe, centre des intérêts principaux de ses filiales étrangères".

indicated that although the Regulation does not deal with the numerous companies existing in the European Union and being part of a group, the Regulation was designed to ensure a proper, efficient and homogeneous administration of justice. In light of that objective, the *Tribunal de commerce* of Nanterre considered that it was in the interests of a proper administration of justice to find a unique solution to the financial difficulties threatening the relevant group of companies.

39. The *Eurofood* case deferred to the CJEU concerned the Parmalat group of companies and one of the questions that had been put to the CJEU was how to determine the COMI of a subsidiary where it and its parent have their respective registered offices in two different Member States and the weight that should be given to the fact that the parent company is able, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.

40. The CJEU indicated that "each debtor constitutes a distinct legal entity and is therefore subject to its own court jurisdiction". Further, the CJEU recalled that "the concept of COMI has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation". Finally, the CJEU added that "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 the Regulation".

41. It follows from the above that the CJEU did not rule out the possibility of insolvency proceedings being opened in relation to all members of a group by the courts competent to open insolvency proceedings in relation to the parent company. The CJEU's reasoning, however, shows that it expects national courts to adopt a more strict approach when deciding that they have jurisdiction over all the members of a group. Indeed, the courts competent to open insolvency proceedings against the parent company will only be able to extend such proceedings to the subsidiaries if it is established that the COMI of each subsidiary is situated at the registered office of the parent company based on factors which are both objective and ascertainable by third parties and that are not based only on control.[27]

[27] J.-L. Vallens, "Le règlement européen sur les procédures d'insolvabilité à l'épreuve des groupes de sociétés : l'arbitrage de la CJCE", *op. cit.*

§ 3. The reception of Eurofood by domestic courts

42. Following the *Eurofood* decision, several judgments have been rendered by national courts, which applied the *Eurofood* test for determining COMI.[28] We will focus on certain Luxembourg, French and English examples.

Luxembourg

43. There are, to our knowledge, relatively few cases in which Luxembourg courts have had to apply the Regulation and in particular the COMI test. The case that will be analysed shows that even within the same jurisdiction, the fact-sensitivity of the COMI test may lead to diverging interpretations and outcome.

44. A Luxembourg court[29] held that the COMI of a company governed by Luxembourg law having its registered office in Luxembourg was in Luxembourg although the company alleged that its COMI was in France.

45. The Luxembourg court of first instance held that "in order to locate the centre of main interests, one needs to establish a body of concordant indicia, such as the place of the board of directors meetings, the law governing the main contracts, the location of the business relations with the customers, the place where the commercial policy is defined, the location of the creditor banks and the centralized management of the purchasing policy, the staff, the accounting and the technology system. (See TGI of Lure, 29 March 2006, No. 06/1 of the Roll; *Tribunal de commerce* of Nanterre, 3rd Chamber, 15 February 2006, No RG 06P154.)"

46. Among the elements that the company presented to prove that its COMI was in France were the fact that the company had mainly French customers and Italian suppliers, the invoices were addressed to the company in France, a report from the Luxembourg tax authorities reporting the lack of activity in Luxembourg requiring payment of VAT, a report from the French tax authorities indicating that the company carries out an economic activity in France (the management being ensured from the private residence of a director).

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[28] For an overview of the interpretation by courts in 12 jurisdictions of the COMI concept, see "CMS Guide to Finding COMI", June 2013 available at http://eguides.cmslegal.com/finding_comi.

[29] TA Lux., 9 February 2007, No. 105710, *BIJ*, 2007, p. 81; F. Fayot, C. Martins Costa, "Chronique droit des sociétés (2006-2012)", *Ann. Dr. Lux.*, 2011, p. 303; S. Jacoby, "Le siège social au regard des procedures d'insolvabilité", *JTL,* No. 1/2009, p. 23.

47. The court held however that the evidence presented certain contradictions and was not conclusive to rebut the presumption of article 3 of the Regulation.

48. The Court of appeal held that the COMI of the company was located in France. The court[30] focused on the location of the company's infrastructure and on the elements showing the place where the company exercised its business activity and managed its customer and supplier relationships. The Court of appeal gave less importance to elements such as the place where the board of directors met or the place where the company received mail or the fact that some suppliers still invoiced the company at its registered office.

France

Eurotunnel

49. Three months after the *Eurofood* decision, the *Tribunal de commerce* in Paris handed down its judgment in the famous *Eurotunnel* case.[31] Eurotunnel Plc, an English public limited company and Eurotunnel SA, a French public limited company are the holding companies of the Eurotunnel group. The group is composed of subsidiaries in the United Kingdom, Spain, Germany, Belgium and the Netherlands. The management of Eurotunnel requested the opening of safeguard proceedings in favour of all group entities based on the fact that all these entities constitute one single entity, Eurotunnel, whose COMI is located in Paris. Initially the Eurotunnel group was designed as a bi-national group with full parity between France and the United Kingdom. Due to the financial difficulties that the group was facing, the shareholders (the majority of whom were French) requested a change in management. The strategic and operational management of the group was carried out forthwith [thereafter] by a common board located in Paris and composed exclusively of French nationals.[32]

50. Mindful of the *Eurofood* decision, the *Tribunal de commerce* of Paris carefully considered the facts individually for each entity. The *Tribunal de commerce* held that a body of concordant indicia ascertainable by third parties revealed that the COMI of each entity of the group is in Paris based on the

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30 CA Lux., 12 November 2008, No. 32256, *JTL*, No. 1 – 1/2009, p. 32; F. Fayot, C. Martins Costa, "Chronique droit des sociétés (2006-2012)", *Ann. Dr. Lux.*, 2011, p. 303.

31 TC Paris, 2 August 2006, *RG* No. 2006047530, *D.,* 2006, No. 33, p. 2329, note R. Dammann, G. Podeur.

32 R. Dammann et G. Podeur, "L'affaire Eurotunnel, première application du règlement CE No. 1346/2000 à la procedure de sauvegarde", *D.,* 2006, No. 33, p. 2329.

following facts: (i) the strategic and operational management of the Eurotunnel entities is carried out in Paris at the registered office of Eurotunnel SA by a board of directors which is common to all the entities and composed of French nationals; (ii) the registered office of the two main French entities of the group are in Paris; (iii) the group's financial management and accounting is done in France; (iv) the main activities of the group, the employees and the assets are located in France and (v) the negotiations regarding the restructuring of the group debt took place in Paris under the supervision of the French CEO of most group entities.

51. Further examples can be found in Belvédère[33] and Illochroma[34]. In each of these cases, the courts acknowledged the need to coordinate the insolvency proceedings in relation to all the members of a group in the interests of a proper administration of justice.

Coeur-Défense and *Mansford*: French cases concerning Luxembourg holding companies

52. Two French cases are of particular interest regarding Luxembourg holding companies. Both cases concern acquisition finance structures whereby SPV companies are set up in Luxembourg for the purpose of the acquisition of real estate mainly in other Member States by their Luxembourg and foreign subsidiaries, the acquisition being financed by third-party debt at the level of the subsidiaries with collateral being granted at each level of the holding structure. The structuring of acquisitions through Luxembourg holding companies is mainly due to Luxembourg's legal framework and double tax treaty network that provide for sophisticated and flexible structuring mechanisms in international investment portfolio structuring and greater protection for secured creditors.

53. The first case is the well-known *Coeur Défense* case[35]. The acquisition structure was composed of a Luxembourg holding company, Dame Luxem-

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33 T. Com. Beaune, 16 July 2008, No. 001586, *JR vs SAS M. Brizard et R. International*, *Bull. Joly Soc.*, 1 January 2009, No. 1, p. 53, note M.-L. Coquelet, "Des effets insoupçonnés du règlement No. 1346/2000 en droit interne".

34 T. Com. Roubaix-Tourcoing, 21 April 2008, No. 2008-131, *Sté Illochroma-Belgique*, *Bull. Joly Soc.*, 1 December 2008, No. 12, p. 993, note F. Mélin, "Règlement No. 1346/2000 et localisation du centre des intérêts principaux".

35 TC Paris, 3 November 2008, RG No. 2008077996 in relation to Dame Luxembourg and TC Paris, 3 November 2008, RG No. 2008077997 in relation to Heart of la Défense; CA Paris, 25 February 2010; Cass. com., 8 March 2011; CA Versailles, 19 January 2012; M. Lattard, F. Fayot, "Les structures 'double luxco' et leur effet sur la structuration des garanties financières luxembourgeoises", *ALJB*, Bulletin Droit et Banque, No. 49, May 2012, p. 31.

bourg S.àr.l. and a French subsidiary, Heart of La Défense SAS, which owned a building in Paris. The acquisition had been financed through external debt and was fully collateralised. Both companies requested the opening of safeguard proceedings in France. The *Tribunal de commerce* of Paris held that the COMI of Dame Luxembourg S.àr.l. was in France and agreed to open safeguard proceedings in relation to both companies.

54. The judgment of the *Tribunal de commerce* is a remarkable demonstration of the *Eurofood* reasoning. While examining its competence to open safeguard proceedings against Dame Luxembourg S.àr.l., the *Tribunal de commerce* held that (i) Dame Luxembourg S.àr.l. has its registered office in Luxembourg, (ii) article 3 of the Regulation does not apply to group companies, (iii) the situation of each debtor within the group must be analysed separately, (iv) article 3 of the Regulation gives jurisdiction to the courts of the Member State within which the COMI of the debtor is located and, unless proved to the contrary, the COMI is presumed to be located at the registered office, (v) recital 13 defines COMI as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, (vi) the concept of COMI has an autonomous meaning and must be construed independently from national law and (vii) factors which are both objective and ascertainable by third parties need to be taken into account which establish that an actual situation exists which is different from the situation that the registered office is deemed to reflect.

55. The *Tribunal de commerce* then listed a number of factors, which constitute a body of concordant indicia enabling it to be established that the COMI of Dame Luxembourg S.àr.l. is in France. The relevant factors were: (i) the strategic and operational management of the company had become commingled with that of its French subsidiary which held the real estate portfolio, it was carried out by French individuals in Paris at the registered office of the subsidiary, (ii) the registered office of the subsidiary is situated in Paris, (iii) it was a holding company without any employees, (iv) its sole asset was the participations held in the subsidiary whose sole asset was in turn the building in Paris and (v) it had carried out two acts since its incorporation, the incorporation of the subsidiary and the granting of French law-governed security interests over its assets all of which were negotiated and signed in France by directors of the subsidiary.

56. Finally, the *Tribunal de commerce* indicated that the above elements were perfectly well-known to the company's creditors including the lenders and beneficiaries of the security interests, all of whom participated in the acquisition and financing steps.

57. In a case SARL Mansford France Fund 1,[36] two parent companies (one holding 100% of the other) having their registered office in Luxembourg together with their ten subsidiaries also having their registered office in Luxembourg requested the opening of safeguard proceedings in France. The Court of appeal in Paris held that the twelve companies had their COMI in France. First, the Court of appeal concluded that none of the parent companies exercised any business activity in Luxembourg based on the mere fact that the sole asset of the Luxembourg parent companies was the participations held in the subsidiaries. It then examined a series of factors showing where the strategic decisions and effective management concerning the business of the twelve companies took place on a regular basis and from which the companies managed their interests on a regular basis ascertainable by third parties.

58. The evidence presented to the court indicated that (i) all the board meetings of the companies were held in Paris, (ii) that all ten subsidiaries had no business activity in Luxembourg and owned a single asset being a building located in France, (iii) that the parent companies had no business activity in Luxembourg and that their sole asset was the participations held in the subsidiaries which themselves owned buildings in France, (iv) that all contractual relationships of the subsidiaries regarding the management of the real estate portfolio were concluded in France with French companies, such contractual relationships being governed by French law, and (v) that the contractual relationships regarding the financing of the acquisition of the real estate portfolio were entered into by the Luxembourg parent companies in France and were negotiated in Paris.

59. Based on the aforementioned evidence, the Court of appeal held that the place where the strategic decisions were initiated and the place where the management decisions were resolved upon was Paris which was the place from which the companies managed their interests on a regular basis and which was known by the companies' creditors.

60. The reasoning of the Court of appeal is interesting. It first applied the "letter-box entity" test and specifically acknowledged that no business activity existed in Luxembourg (which it has not independently verified but followed the allegations of the applicants). It then went on to determine the "real seat", i.e. the place where the strategic management decisions were initiated and resolved upon. It finally applied an asset test and concluded that the assets and all contractual relationships relating thereto were located in France.

[36] CA Paris, 26 November 2009, No. 09/17248, *Rev. soc.*, September 2010, p. 395, note T. Mastrullo.

61. Interestingly, the *Tribunal de commerce* in the *Coeur Défense* case did not refer to the "business" test while the Court of appeal in the *Mansford* case did. This shows once more the confusion that arises from the ruling of the CJEU in *Eurofood* between recital 13 of the Regulation that refers to the place where the debtor conducts the administration of his interests and the "business" related examples given by the CJEU to illustrate recital 13.

62. These cases also show that in relation to a holding company, it is rather easy to establish that its COMI is located at the registered office of its subsidiary. The situation of a holding company is comparable to that of a subsidiary controlled by a parent. While mere control is not sufficient to establish that the subsidiary's COMI is situated at the registered office of the parent company, the same should be true for a holding company the only assets of which are the participations it holds in the subsidiary which in turn holds a portfolio of assets. The mere fact that the assets are held by the subsidiary and that all contractual relationships relating thereto are concluded and managed by the subsidiary in a different Member State should not be sufficient to establish that the parent's COMI is located at the registered office of the subsidiary.

63. A holding company's business consists of holding participations, their management and supervision. The determination of the COMI of a holding company entails identifying the place from which it manages and supervises its participations on a regular basis and which is ascertainable by third parties. In other words, irrespective of the location of the assets of its subsidiaries or, the place where the contractual relationships are negotiated and entered into, the relevant factor should be the place where the intellectual management and supervision decisions in relation to its portfolio of participations are taken.

64. In addition, it does not account for the business practices in international transactions where negotiations are conducted and concluded in jurisdictions other than the jurisdiction in which the holding company has its registered office.

65. Helpful guidance can, however, be drawn from these cases in order to affirm the COMI of Luxembourg holding companies at their registered office. In practice, one should ensure that the strategic management and supervision decisions of the Luxembourg holding companies are taken in Luxembourg by Luxembourg-based directors.

England

66. English courts, even prior to *Eurofood*, traditionally apply the head office functions test.

67. The *Lennox*[37] and *Standford*[38] cases should be analysed together since both cases were dealt with by the same judge. In Standford, Mr Justice Lewison not only overruled his decision in Lennox but also other decisions previously handed down by English courts.

68. Lennox Holdings Ltd. was a British food supplier having its registered office in England. It was the holding company of a group of companies composed of a number of subsidiaries including European Supplies Logistics SL and Milenion Foods, two Spanish subsidiaries.

69. Mr Justice Lewison found that the COMI of both Spanish subsidiaries was situated in England based on evidence demonstrating that the head office functions of both companies were carried out from England without analysing further whether such head office functions were ascertainable by third parties.

70. In Standford, the applicants argued that Mr Justice Lewison was wrong to simply apply the head office functions test without verifying whether such head office functions were ascertainable by third parties. Mr Justice Lewison acknowledged his mistake and found that "pre-Eurofood decisions by English courts should no longer be followed in this respect".

71. The interesting point to note in Standford is that Mr Justice Lewison rejected the argument of the applications that facts are ascertainable even if they are not in the public domain but could have been obtained from answers to questions asked by third parties. Mr Justice Lewison found that "what is ascertainable to a third party, is what is in the public domain and what a typical party would learn in the ordinary course of business with the company".[39]

72. The *Hellas Telecom*[40] case shows that English courts put considerable emphasis on factors ascertainable by third parties, especially creditors. The court found that "the purpose of COMI is to enable creditors in particular

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37 Lennox Holdings Plc, [2008] EWHC B11 (ch).

38 International Bank Limited, Standford Group Company, [2009] EWCH 1441 (ch.).

39 Re Standford International Bank Ltd and others [2009] EWHC 1441 and Re Standford International Bank Ltd [2010] EWCA Civ 137 mentioned *in* L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*

40 Re Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 mentioned *in* L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*

to know where the company is and where it may deal with the company. Therefore, […] one of the most important features of the evidence […] is that all negotiations between the company and its creditors have taken place in London". Similarly, in ReCi4net.com Inc.[41] the court found that "the most important 'third parties' referred to in recital (13) are the potential creditors. In the case of a trading company the most important groups of potential creditors are likely to be its financiers and trade suppliers".

73. Mr Justice Lewison further rejected the findings of the court in ReCi4net.com Inc., which held that the registered office presumption is not very strong and is only one of the factors to be considered. For Mr Justice Lewison "the location of a company's registered office is a true presumption and the burden lies on the party seeking to rebut it".

§ 4. The situation after Eurofood

74. Authors have generally welcomed the *Eurofood* test in that it is flexible allowing courts to take a pragmatic approach in determining the COMI of a company. The *Eurofood* test, however, is predominantly a factual test that, depending on the factors taken into account and the weight given to each factor, leads to a different outcome.

75. Courts were left with a wide measure of discretion in the selection of the factors to be taken into account. While some courts tried to establish, based on a body of concordant indicia relating to the location of the business, the management, the assets, the jurisdiction with which the debtor has the closest relations, others were satisfied by the simple fact that the debtor deliberately decided to move its COMI to a different jurisdiction.

76. Factors which have been considered in various cases across Europe are:[42]

- the place where the board of directors meetings and the general meetings of shareholders usually take place;
- the place of residence of the directors;
- the place where the treasury management is carried out;
- the place of the supervision or the general oversight and the strategic oversight of the group;
- the location of the main commercial transactions;

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41 ReCi4net.com Inc [2005] BBC 277, mentioned *in* J. Marschall, "*Eurofood*: was it worth the wait?", *Practical Law Company*, Resource ID:1-202-4602.

42 L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*

– the location of the lenders;
– the location of the employees and of the human resources functions;
– the location of the IT systems;
– the place where the accounting is kept;
– the law governing the main contracts;
– corporate identity and branding;
– the location of restructuring negotiations with creditors.

77. Given the mouldable nature of the COMI concept, it is possible to influence the outcome of the COMI analysis by either acting upon the facts of the case and making them fit the particular result that one may want to achieve e.g. moving assets from one jurisdiction to another, holding board meetings in another jurisdiction or by focusing on certain factors which support the desired outcome leaving other factors aside.

78. In that context, it is important to consider the underlying objectives of the Regulation. According to recitals 2, 4 and 8 of the Regulation, the Regulation is designed to ensure the efficient functioning of cross-border insolvency proceedings, to discourage forum shopping and to provide creditors with legal certainty as to the expected effects of the cross-border insolvency proceedings.

79. In the *Staubitz-Schreiber* decision, the CJEU emphasised that the concept of COMI is to be interpreted in light of the underlying objectives of the Regulation. The CJEU further indicated in the *Eurofood* decision that given the effects of the COMI determination on the competent jurisdiction and applicable law, it is all the more important that the criteria to be taken into account when determining COMI must be objective and ascertainable by third parties because that objectivity and the possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings.

Sub-section 2
Interedil : the central administration test

80. The questions deferred to the CJEU in the Interedil case are symptomatic of the lack of clarity of the Eurofood test and the factors to be considered when determining COMI.

81. According to the Commission's Impact Assessment, 77% of respondents approved the use of COMI as the criteria to determine jurisdiction but

51% of the respondents considered that despite the clarifications given by the CJEU the concept is "too vague and unclear, making it difficult for the parties concerned to predict the decision on jurisdiction and for the courts involved to decide in a coherent manner".[43]

82. The *Tribunale di Bari* asked the CJEU to clarify how the term COMI was to be defined and the decisive factors or considerations that should be taken into account for the purpose of identifying the COMI. More precisely, the *Tribunale* queried whether the presumption of article 3 of the Regulation could be rebutted if the debtor carries on a genuine business activity in a Member State other than that in which it has its registered office or whether it is necessary that the debtor has not carried on any business activity in the State in which it has its registered office. Finally, the *Tribunale* asked the CJEU whether the location of assets and of contractual relationships in a Member State other than that of the registered office were sufficient to rebut the presumption of article 3 of the Regulation.

83. In answering these questions, the CJEU relied on the concept of central administration for determining a debtor's COMI that reinforces the presumption of article 3(1) of the Regulation. The "business" test inferred from the *Eurofood* decision, however, does not entirely disappear.

§ 1. The central administration test

84. The *Eurofood* test that the COMI corresponds to the place where a debtor conducts the administration of its interests on a regular basis, such a place to be identified based on factors which are both objective and ascertainable by third parties as illustrated by the CJEU's "business"-related examples was not crystal clear. It is fair to say that the *Eurofood* test was ill-designed. The general and vague nature of the terminology used by CJEU in *Eurofood* and the lack of definition of the factors capable of identifying the COMI, allowed a great deal of discretion in the selection of the elements necessary to establish the COMI, as the case law analysed above shows.

85. Many national courts applied the head office functions test to determine a debtor's COMI and considered the place where the management decisions were taken as part of their analysis but without such a factor prevailing over other factors. Also, the fact that the CJEU used "business"-related examples to illustrate the test led national courts to attach great importance to the place where a debtor conducted its business activity and held assets.

[43] SWD (2012) 416 final, p. 19.

86. In *Interedil*, the CJEU confirmed that the COMI is to be understood as meaning the debtor's central administration (or head office or real seat)[44]. It found that "the presumption in the second sentence of article 3(1) of the Regulation that the place of the company's registered office is the centre of its main interests and the reference in recital 13 in the preamble of the Regulation to the place where the debtor conducts the administration of his interests reflect the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction. […]".

87. The CJEU followed in that respect the opinion of the advocate-general.[45] The advocate-general referred to the explanations given in the Virgos-Schmit Explanatory Report as to the meaning of COMI.[46]

§ 2. The rebuttal of the presumption

88. *The CJEU affirmed the principle that the central administration of a debtor normally coincides with its registered office. It held that "where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of article 3(1) of the Regulation that the centre of the company's main interests is located in that place is wholly applicable. In such a case, […] it is not possible that the centre of the debtor company's main interests is located elsewhere".*

89. The question whether this principle can be challenged depends on the perception by third parties and in particular by creditors of the place where the central administration is located AND the management decisions are taken.[47] If third parties can ascertain that both the central administration of the debtor is located, and the management decisions are taken, at the registered office of the debtor, the presumption that the debtor's COMI is located at its registered office cannot be rebutted.

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[44] A. Looijestijn-Clearie, "The Insolvency Regulation and Cross-Border Corporate Mobility in the Light of the *Interedil* Ruling", *DAOR,* 2012/012, p. 184; F. Mélin, "Nouvelles précisions relatives aux notions de centre des intérêts principaux et d'établissement du débiteur", *op. cit.*

[45] §69 of the opinion of the advocate-general.

[46] See paragraphs 24 to 26 above.

[47] G. Minne, "Arrêt *Interedil*: la Cour de justice de l'Union européenne clarifie le cotenu des notions de 'centre des intérêts principaux' et 'd'établissement' du règlement No. 1346/2000 relatif aux procédures d'insolvabilité", *ALJB,* Bulletin Droit et Banque, No. 50, November 2012, p. 59.

90. In that respect, the CJEU indicated that this principle implies that third parties have been made sufficiently aware of the location of the central administration.[48] It held that "the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them".

91. The CJEU then stated that "the presumption in the second sentence of article 3(1) of the Regulation may be rebutted, however, where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. As the court held at paragraph 34 of Eurofood IFSC, the simple presumption [...] can be rebutted 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 locating it at the registered office is deemed to reflect".

92. In other words, if third parties ascertain that the central administration of a debtor does not coincide with its registered office, a rebuttal of the presumption of article 3(1) of the Regulation is possible provided that objective factors ascertainable by third parties confirm that the central administration is located somewhere else.[49]

93. As to the factors to be taken into account, these include, in addition to the central administration of the debtor as perceived by third parties, "all the places in which the debtor company pursues economic activities and all those in which it holds assets, insofar as those places are ascertainable by third parties".

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[48] J.P. Legros, note under CJUE, 20 October 2011, *Droit des Sociétés*, Revue Mensuelle Lexisnexis Jurisclasseur, August – September 2012, p. 36.

[49] T. Mastrullo, "Critères et date d'appréciation du centre des intérêts principaux: les précisions de l'arrêt *Interedil* Srl", *Rev. soc.*, February 2012, p. 116.

94. The most significant statement of the CJEU is however that "those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case. […] The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption […] unless a comprehensive assessment of all the relevant factors makes 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 the management of its interests is located in that other Member State".

95. As a result, the CJEU requires national courts when determining the COMI of a debtor at a place different from its registered office to perform an overhaul assessment of the situation. The location of the debtor's COMI is to be deduced from a set of relevant and sufficiently transparent factors the most important factor being the perceived location of the central administration. Other factors such as the activity of the company and the location of the corporate assets may be taken into account as part of the overhaul assessment it being understood that these factors are not by themselves conclusive as to the location of the COMI.

96. The *Interedil* decision, whilst confirming that the COMI should correspond to the place where the head office functions are carried out[50] identified using the method of a body of concordant indicia developed by national courts[51], condemns the selective approach of domestic courts which found that they had jurisdiction giving priority to isolated and not necessarily concordant factors such as the location of the most important assets or the place where contractual relationships were concluded.[52] Further to *Interedil*, domestic courts will have to apply the head office functions test with a lot more dexterity.

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[50] A. Looijestijn-Clearie, "The Insolvency Regulation and Cross-Border Corporate Mobility in the Light of the Interedil Ruling", *op. cit.*

[51] M. Menjucq, "Centre des intérêts principaux : les apports de l'arrêt *Interedil* de la CJUE du 20 octobre 2011", *Revue des procédures collectives*, Revue Bimestrielle Lexisnexis Jurisclasseur, November – December 2011, p. 19.

[52] R. Dammann, A. Albertini, "L'arrêt *Interedil* de la CJUE : notion de centre des intérêts principaux", *JCP E*, No. 19 and 20, 11 May 2012, p. 25 ; F. Mélin, "Nouvelles précisions relatives aux notions de centre des intérêts principaux et d'établissement du débiteur", *op. cit.*

97. Some authors believe that the CJEU departed from the "business" test in *Eurofood*[53] but did *Eurofood* really establish a "business" test?[54] The scope of *Eurofood* was limited in that it simply stated that the COMI was to be determined by reference to factors which are objective and ascertainable but did not define those factors nor did it define a level of importance between a series of relevant factors. The examples of the "letter-box" entity with no business in the territory in which it has its registered office and of the subsidiary carrying out business in the territory in which it has its registered office but whose economic choices are determined by a parent company whose registered office is situated in another Member State, used by the CJEU in *Eurofood,* could lead one to believe, in the absence of a definition of the relevant factors to be taken into account, that the CJEU considered the COMI from a business perspective and that business-oriented factors should therefore be looked at to determine the COMI. However, on perusal of the *Eurofood* decision in light of *Interedil*, it is apparent that both decisions define the COMI by reference to the place where a debtor conducts the administration of its interests. It is therefore conceivable that the CJEU did not in fact depart from *Eurofood* but rather clarified *Eurofood* by defining the concept of "conducting the administration of interests" used in *Eurofood* as well as the factors to be considered when determining the COMI and by establishing a priority between the relevant factors.

Sub-section 3

Date on which COMI is to be determined

98. Another important issue when determining COMI is the date on which the COMI analysis is to be made especially in the case of a COMI shift to another jurisdiction. In that respect, the CJEU provided guidance in the *Staubitz-Schreiber* and in the *Interedil* cases.

99. Ms *Staubitz-Schreiber* operated a telecommunications business in Germany. She applied in December 2001 for the opening of main insolvency

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[53] See M. Combet, "Précisions sur le 'centre des intérêts principaux' dans le cadre d'une prodécure d'insolvabilité", *RLDA*, May 2012, No. 71, p. 68; T. Mastrullo, "Critères et date d'appréciation du centre des intérêts principaux: les précisions de l'arrêt *Interedil* Srl", *op. cit.*; M. Menjucq, "Centre des intérêts principaux: les apports de l'arrêt *Interedil* de la CJUE du 20 octobre 2011", *op. cit.*

[54] R. Dammann, A. Albertini, "L'arrêt *Interedil* de la CJUE: notion de centre des intérêts principaux", *op. cit.*, p. 27; A. Lienhard, "Procédure d'insolvabilité: notion de 'centre des intérêts principaux'", *D.*, 3 November 2011, No. 38 p. 2593; G. Minne, "Arrêt *Interedil*: la Cour de justice de l'Union européenne clarifie le contenu des notions de 'centre des intérêts principaux' et 'd'établissement' du règlement No. 1346/2000 relatif aux procédures d'insolvabilité", *op. cit.*; F. Jault-Seseke, D. Robine, *Rev. Crit. DIP*, 101 (1), January-March 2012, p. 201.

proceedings before the German courts. In April 2002, she moved to Spain to work and live there. The German courts refused to open main insolvency proceedings on the grounds that they did not have jurisdiction since the COMI of Ms *Staubitz-Schreiber* was situated in Spain.

100. The question deferred to the CJEU was whether the court of a Member State which receives a request for the opening of insolvency proceedings still has jurisdiction to open insolvency proceedings if the debtor moves the centre of his main interests to the territory of another Member State after filing the request but before the proceedings are opened, or whether the court of that other Member State would acquire jurisdiction.

101. *Interedil* was incorporated under Italian law and had its registered office in Italy. In mid-July 2011, *Interedil* transferred its registered office to London. It was removed from the Italian register of companies and registered with the English register of companies. Two years after *Interedil*'s transfer of registered office, a creditor of *Interedil* filed a petition in Italy for the opening of insolvency proceedings against *Interedil*. *Interedil* challenged the jurisdiction of the Italian courts on the grounds that it had moved its COMI to England.

102. The CJEU was not asked to express a view on the date relevant to determine the COMI but the particular facts of the *Interedil* case led the CJEU to examine the question in the context of its general analysis of the COMI determination.

103. The CJEU emphasised that the Regulation is to be construed in light of the underlying objectives of the Regulation to ensure the efficient functioning of cross-border insolvency proceedings, to discourage forum shopping and to provide creditors with legal certainty as to the expected effects of the cross-border insolvency proceedings.

104. It found that the objective to avoid forum shopping would not be achieved if a debtor was able to transfer his COMI to another Member State after lodging a request for the opening of insolvency proceedings but before the opening of such proceedings given the effects of such a transfer on the competent jurisdiction and the applicable law. It also found that it is not in the interests of an efficient and effective management of cross-border proceedings to oblige creditors to continuously follow the debtor to the jurisdiction in which the debtor has chosen to be established.

105. The CJEU therefore considered that the relevant date for the purpose of locating a debtor's COMI is the date on which the request to open insolvency proceedings was lodged irrespective of whether the debtor moves its regis-

tered office to another Member State after lodging the request but before the proceedings are opened. In the case of a transfer of the registered office before a request to open insolvency proceedings is lodged, a debtor's COMI will be presumed to be the place of the debtor's new registered office.

106. The CJEU's findings in respect of the relevant date for the purpose of determining COMI, however, are not satisfactory in light of the aims that the Regulation pursues. It does not address the abusive transfer of COMI very shortly before the opening of insolvency proceedings nor does it afford creditors with the legal certainty in terms of the expected effects of the cross-border insolvency proceedings.[55]

Section 2
Forum shopping : groups of companies, migration, freedom of establishment, abuse

Sub-section 1
Forum shopping : rationale

107. In the context of insolvency proceedings, forum shopping entails "identifying the optimal jurisdiction for restructuring and insolvency proceedings and directing matters accordingly".[56]

108. COMI relocations are essentially driven by differences in national insolvency and company laws[57] that allow more or less flexibility in the conduct of the insolvency proceedings. The choice of the jurisdiction will depend on factors such as the required court and creditors involvement, the moratorium rules on creditor's action, the sophistication of the insolvency procedures and whether or not complicated restructuring and rescue plans can be implemented as well as the experience and reputation of national courts in handling insolvency proceedings.[58]

109. It follows that Member States, the law and courts of which provide debtors and/or creditors with the most advantageous insolvency environment will

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55 F. Jault-Seseke, D. Robine, *op. cit.*; R. Dammann, A. Albertini, "L'arrêt *Interedil* de la CJUE : notion de centre des intérêts principaux", *op. cit.*

56 L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*

57 Commission's Impact Assessment, *op. cit.*, p. 21.

58 L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*; W.-G. Ringe, "Forum Shopping under the EU Insolvency Regulation", August 2008, available at http://ssrn.com/abstract=1209822.

attract COMI relocations. English law and the restructuring possibilities that it offers are considered to be a popular jurisdiction for COMI relocations.[59]

110. Recital 4 of the Regulation firmly demonstrates a hostile attitude towards forum shopping in the context of cross-border insolvency proceedings and the European Union legislature's intention to "prevent incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position" in the interest of the proper functioning of the internal market".

111. The Explanatory Report explains that, in the absence of a common legal framework at international level regarding insolvency proceedings, it is important to afford creditors with a certain level of predictability in terms of jurisdiction and applicable law so as to put them in a position to assess the legal risk that they assume in the case of insolvency of their debtor.[60] The concept of COMI is the cornerstone concept, which is intended to ensure that the insolvency risk is foreseeable for creditors in that the COMI, being the place best known to creditors, will determine the competent jurisdiction and the applicable law.

112. From that perspective, forum shopping has a direct impact on creditors and their expectations as to the insolvency rules and proceedings, which will apply in the case of a debtor's default.

113. However, forum shopping must not be regarded *per se* as abusive and illegal. Mr Colomer, the advocate-general in the *Staubitz-Schreiber* case expressed the view that, "if forum shopping is defined as the search by a plaintiff for the international jurisdiction most favourable to his claims, there is no doubt that, in the absence of legal uniformity in the different private international law systems, that phenomenon must be accepted as a natural consequence which is not open to criticism".

114. The Commission's Report also endorses the fact that there may be valid reasons to operate a COMI shift. The Commission considers that relocations of companies with a view to benefiting from more sophisticated restructuring mechanisms cannot be regarded *per se* as abusive and illegitimate.

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[59] Commission's Impact Assessment, *op. cit.*, p. 21; for an overview of English insolvency law see: "An introduction to English Insolvency Law", *Slaughter and May,* April 2013, available at http://www.slaughterandmay.com/media/251437/an-introduction-to-english-insolvency-law.pdf.

[60] M. Virgos, E. Schmit, "Report on the Convention of Insolvency Proceedings", *op. cit.*, §75, p. 51; F. M. Mucciarelli, "The unavoidable persistence of forum shopping in the Insolvency Regulation", *Cefin*, April 2013, available at www.cefin.unimore.it; W.-G. Ringe, "Forum Shopping under the EU Insolvency Regulation", *op. cit.*

115. First, COMI relocations must be analysed in light of the CJEU's case law that expressly permits COMI shifts as a legitimate exercise of the freedom of establishment. In Centros, the CJEU held that "the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The fact [...] that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment".[61]

116. Second, COMI relocations allow successful rescues and restructuring of businesses that in principle is beneficial to the creditors.[62] Similarly, ever since the inception of the Regulation, national courts have construed the COMI concept broadly so as to centralise insolvency proceedings for all members of a group.[63]

117. However, as the advocate-general in *Staubitz-Schreiber* stated, it is a legitimate legislative objective to eradicate abusive forum shopping which leads to inequality between the parties to a dispute with regard to the defence of their respective interests.[64]

Sub-section 2

COMI relocations : Legal and factual relocations

118. There are a number of legal and factual ways to achieve COMI relocations.

§ 1. Legal COMI relocations : Corporate mobility and freedom of establishment

119. Two pieces of European Union legislation enacted since the adoption of the Regulation enable the transfer by a company of its registered office from one Member State to the other without winding-up or dissolution.

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61 CJEU, 9 March 1999, case C-212/97, *Centros Ltd vs Erhvervs- og Selskabsstyrelsen*, §27 and §29.

62 COM (2012) 743 final, p. 10.

63 V. Hoffeld, E. Omes, "Migrating Comi", *IFLR Supplement – The 2009 guide to insolvency and restructuring*, Luxembourg.

64 Opinion of the advocate-general in *Staubitz-Schreiber*, §73.

120. First, a transfer of registered office may be implemented under the provisions of Directive 2005/56/EC on cross-border mergers of limited liability companies. A company wishing to transfer its registered office from one Member State to another will incorporate a subsidiary in that other Member State and merge into it. The surviving entity will be subject to the law of that other Member State, own all the assets, and continue the activities, of the absorbed entity in that other Member State.[65]

121. Second, companies incorporated under the form of a European Company pursuant to Council Regulation (EC) No. 2157/2001 on the Statute for a European Company may transfer their registered office from one Member State to another subject to certain conditions.

122. These two legal mechanisms achieve the migration of a company from one Member State to another but have the disadvantage of being time-consuming and costly in their implementation.

123. A COMI relocation may further be implemented either through a transfer of registered office or central administration from one Member State to another pursuant to the freedom of establishment subject, however, to the national law governing the relevant company.

124. In the absence of harmonised European Union legislation in this respect, the CJEU has, in a large number of cases, shaped the principles applying to the cross-border mobility of companies in light of the principle of the freedom of establishment enshrined in articles 49 and 54 of the Treaty on the Functioning of the European Union ("TFEU").

125. Pursuant to articles 49 TFEU and 54 TFEU, a company having its registered office, central administration or principal establishment in a Member State enjoys the freedom of establishment within the European Union and Member States may not, in principle, impose any restrictions on the exercise of such freedom of establishment.

126. A cross-border transfer of a company may either result from (i) a transfer of registered office, (ii) a transfer of central administration without transfer of the registered office and (iii) a simultaneous transfer of the registered office and of the central administration.

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[65] W.-G. Ringe, "Forum Shopping under the EU Insolvency Regulation", *op. cit.*; L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*; F. M. Mucciarelli, "The unavoidable persistence of forum shopping in the Insolvency Regulation", *op. cit.*

127. The CJEU acknowledged very early on the differences which exist in the legislations of the Member States with regard to the connecting factor which commands the law applicable to the incorporation and functioning of a company as well as to the transfer of that connecting factor to another Member State. While some Member States apply the theory of incorporation other Member States apply the theory of the real seat.[66]

128. In Sevic Systems[67], Überseering[68], Cartesio[69] and Vale Építési[70], the CJEU confirmed that the freedom of establishment enshrined in articles 49 TFEU and 54 TFEU applies to the cross-border conversion of a company without dissolution or liquidation. In other words, under the principle of the freedom of establishment a company incorporated in one Member State may convert into a company governed by the law of another Member State while maintaining its legal personality.[71]

129. In Überseering, the CJEU found that the possibility for a company to transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation as well as the rules relating to that transfer are to be determined by the law of the Member State of incorporation.

130. As a result, each "Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such capable of enjoying the right of establishment, and that required if the company is to be able subsequently

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66 CJEU, 27 September 1988, case 81/87, *The Queen vs H. M. Treasury and Commissioners of Inland Revenue*, ex parte Daily Mail and General Trust plc.

67 CJEU, 13 December 2005, case 411/03, *Sevic Systems AG*.

68 CJEU, 5 November 2002, case C-208/00, *Überseering BV vs Nordic Construction Company Baumanagement GmbH (NCC)*.

69 CJEU, 16 December 2008, case C210/06, *Cartesio Oktató és Szolgáltató bt.*

70 CJEU, 12 July 2012, case C378/10, *Vale Építési kft*.

71 P.-H. Conac, "La CJUE reconnaît le transfert international de siège et ouvre la voie à une directive", *D.*, 27 December 2012, No. 44, p. 3009; T. Allain, "Le transfert transfrontalier du siège social sous le prisme de la transformation", *Droit des Sociétés*, Revue mensuelle Lexisnexis Jurisclasseur, December 2012, p. 6; C. Cathiard, D. Poracchia, T. Bermeyer, "Regard sur le transfert transfrontalier du siège des sociétés: une avancée", *RLDA*, November 2012, No. 76, p. 10; M. Menjucq, "Transformation transfrontalière: la CJUE poursuit son action militante pour pallier la carence de la Commission européenne", *JCP G*, No. 41, 8 October 2012, p. 1834; J. Vermeylen, "Arrêt 'Vale Építési': la mobilité transfrontalière du siège statutaire est-elle un droit?", *JDE*, No. 193, 9/2012, p. 276; R. Kovar, "La mobilité des sociétés dans l'espace européen", *D.*, 2009, No. 7, p. 465; G. Parleani, "Après l'arrêt Cartesio, l'arrêt Vale apporte de nouvelles précisions sur la mobilité intra-européenne par 'transformation'", *Rev. soc.*, November 2012, p. 645.

to maintain that status". In other words, if a company "transfers the factor" connecting it with the law of its home Member State to a host Member State, the home Member State is no longer entitled to permit the company to be governed by the law of the home Member State since the connecting factor no longer exists.

131. In Überseering and Cartesio, the CJEU found, however, that if a company "transfers the factor" connecting it with the law of its home Member State to a host Member State with an attendant change of the law applicable to the company, no restrictions, such as a liquidation or winding-up, may be imposed by the home Member State or the host Member State preventing that company from converting itself into a company governed by the law of the host Member State.

132. Practical difficulties may arise, however, in that a cross-border conversion results in the successive application of two national laws, that of the home Member State with respect to the conditions governing the departure of the company and that of the host Member State that governs the conditions of incorporation and functioning of the type of company into which the company converts.

133. The transfer by a company of its registered office from one Member State to another Member State will result in the COMI of that company, being presumed to be situated at the new registered office pursuant to article 3(1) of the Regulation.

134. Lastly, COMI relocation may be achieved by the transfer of all assets and liabilities of a company in one Member State to a company having its COMI in another Member State.

135. Two German companies *Schefenacker* and *Deutsche Nickel* have used this method to relocate their COMI to England so as to benefit from the English insolvency law and restructuring regime which allow debt-for-equity swaps and company voluntary arrangements.[72]

§ 2. Factual COMI relocations: examples

136. *A factual COMI relocation consists of shifting the COMI of a company from the Member State in which it has its registered office to another Member*

[72] For an explanation of the restructuring plan see W.-G. Ringe, "Forum Shopping under the EU Insolvency Regulation", *op. cit.*; *Commission's Impact Assessment*, *op. cit.*, p. 20; L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*

State by rebuttal of the presumption of article 3(1) of the Regulation that the COMI of a company is situated at its registered office. This is achieved by taking active steps to relocate the COMI to another jurisdiction as part of an insolvency strategy. It generally involves moving head office functions and assets in accordance with the COMI determination test developed by the CJEU in Staubitz-Schreiber, Eurofood and Interedil in a manner perceivable by third parties.

137. There are a number of cases (mostly unreported) involving Luxembourg law-governed companies that have successfully moved their COMI to England.[73]

138. In *Hellas Telecommunications (Luxembourg) II SCA,*[74] the company argued that it had moved its COMI to England in order to benefit from the English law insolvency and restructuring regime allowing administration and a pre-pack.[75]

139. The *Hellas Telecom* case has been held to give useful guidance as to the steps to be taken and the evidence to be shown to obtain the recognition of a successful COMI shift by English courts.[76]

140. The directors of Hellas Telecom presented evidence that the company's COMI had been relocated to England three months before the court application for an administration order whereas the registered office of the Company remained in Luxembourg.

141. The court found that "the objective and ascertainable facts on which the company relies in support of its contention that it has shifted its COMI are that its head office and principal operating address is now in London, albeit that the premises it occupies are relatively modest since the company is no more than a financing vehicle. The company's creditors were notified of its

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[73] C. Pilkington, "Schemes of arrangement London calling", *IFLR*, March 2013, p. 52, see in particular the table of schemes of arrangements which shows British Vita another Luxembourg law-governed company; White & Case, "Schemes of Arrangement, current hot topics and market trends", available on the website of White & Case.

[74] Hellas Telecommunications (Luxembourg) II SCA, [2009] EWHC 3199 (ch.) available at http://bailii.org.

[75] For a detailed explanation of the Hellas Telecom restructuring see "Wind Hellas, a complex restructuring in a global recession", *PLC Magazine*, March 2011, also available on the website of White & Case LLP; see also *Slaughter and May*, "Financial Restructuring of Wind Hellas, 2009" available on the website of Slaughter and May.

[76] *Linklaters*, "Moving COMI: Guidance from the Wind Hellas judgment", December 2009, available on the Linklaters website; Jones Day, "Forum Shopping, Portable COMI, and the Lessons of Wind Hellas", *Jones Day Business Restructuring Review,* available on the website of Jones Day.

change of address around that time and an announcement was made by way of a press release that its activities were shifting to England. It has opened a bank account in London and all payments are made into and from that bank account although there still remains a bank account in Luxembourg to deal with minor miscellaneous payments. It has registered under the Companies Act in this country, although its registered office remains in Luxembourg and it may remain liable to pay tax in Luxembourg too".

142. The most important element that was decisive in the court's finding was the fact that all negotiations between the company and its creditors with respect to the pre-pack sale of the company's assets took place in London.

143. Another interesting point of this case is the recognition by the court of COMI shifts in general: "one might expect in a system of law which encourages a single market across the whole of the European Union that it is possible for an entity, whether a corporate entity or an individual, to change its COMI from its original or presumed location".

144. Prior to Hellas Telecom, Damovo Group SA, a Luxembourg law-governed company having its registered office in Luxembourg, implemented a COMI shift to England and applied for an administration order and pre-pack.[77] The steps taken by the company to successfully move its COMI to England were: (i) the company's head functions were moved to England, (ii) all suppliers, creditors and counterparties were informed of the new address in England, (iii) board meetings were held in England and (iv) bank accounts were opened in England.[78]

145. Interestingly, in one instance an English law-governed company having its registered office in England moved its COMI to Luxembourg. A creditor of Office Metro Limited (previously Regus Limited) petitioned for the opening of main insolvency proceedings in England. The company raised that it was already subject to insolvency proceedings in Luxembourg.[79]

146. The court found that the company had changed its COMI to Luxembourg. The factual COMI analysis made by the court was the following: "the company, by resolution, transferred its main headquarters and place of administration to Luxembourg. It retained (it had to) a registered office [in England] but had no interest in any part of those premises either as a tenant or as a licensee. It maintained no employed staff in those premises (it had in fact never

77 Re Damovo Group SA (unreported), 25 April 2007 (ch.D).

78 L. Webb, M. Buttler, "Forum shopping in insolvency proceedings", *op. cit.*

79 Unreported in Luxembourg.

had an employee at those offices), or indeed at that time in the UK. It rented premises in Luxembourg, and was granted a Luxembourg company registration number. Mr Barden [the Luxembourg bankruptcy trustee] believes that all board meetings since then have been held in Luxembourg. Since 1 January 2009, the company has had no employees at all. So far as any activities have to be conducted for the company in England, they are conducted by a service company in the Regus group, namely Regus Group Services Limited. That provides, when necessary, a number of services, including legal, financial, marketing and other administrative services, as it does to all Regus group companies globally. It has provided accounting and legal services to the company and some limited administrative services, including forwarding post which arrives at the registered office to Luxembourg. Various contacts took place from time to time between Trillium [the petitioning creditor] on the one hand and Mr Stephen Wetherhall, who is group legal counsel employed by the service company; he is the person who dealt when rent needed paying. Other accounting services are provided to the company out of Luxembourg by employees of a Luxembourg Regus company".[80]

147. The famous *PIN Group* case[81] provides another example of a COMI shift by a Luxembourg company. PIN Group AG SA is the holding company of the PIN group, Germany's second-largest mail service provider. It was formed under Luxembourg law and had its registered office in Luxembourg. In January 2008, the company filed an application for the opening of main insolvency proceedings in Germany. The court relied on the evidence presented by the company demonstrating that the company had moved its COMI to Cologne in Germany but also on the findings of an expert appointed by the court.

148. The court acknowledged that as a holding company, the company was responsible for the determination and implementation of the group's business, operational and financing strategy and that until mid-December 2007, such activities were carried out by the board of the company from Luxembourg.

149. It then went on to list the activities and assets that had from mid-December 2007 been transferred to Germany in a manner which was ascertainable by third parties in accordance with *Eurofood*. It considered the fact that

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[80] Trillium (Nelson) Properties Limited and Office Metro Limited, 9 May 2012, [2012] EWHC 1191 (ch.).

[81] Amstgericht Köln, 19 February 2008, 73 IE 1/08 available at www.rws-verlag.de/hauptnavigation/volltexte.html?volltext=571e0f7e2d992e738adff8b1bd43a521&jahr=2008&date_anchor=03032008; R. Dammann, G. Podeur, "Procédures d'insolvabilité: interprétation jurisprudentielle souple du règlement", *D.*, 2008, No. 39, p. 2738; S. Jacoby, "Le siège social au regard des procedures d'insolvabilité", *JTL*, No. 1/2009, p. 23.

the board of directors of the company had been recomposed with German nationals, that all board meetings took place in Germany so that the company and the group were effectively managed from Germany, that offices were rented in Germany and the company's books and records were transferred from the Luxembourg registered office to the newly rented German offices, that the negotiations with potential new clients but also with the group's bank creditors and investors as well as the day-to-day management of client and supplier relationships took place in Germany, that a bank account was opened in Germany, that the employee instructions were given by the board from Germany and that the relationships with the press and all external communications were the responsibility of the board in Germany.

150. The court compared the magnitude of the activities carried out and the assets situated in Germany with those left in Luxembourg. It concluded that although the company retained offices and employees in Luxembourg, only limited or ancillary activities were carried out in Luxembourg.

151. Of particular note in PIN Group is that the court considered the COMI shift organised by the company to be legitimate even though it occurred just one month before the filing of an application for the opening of insolvency proceedings. It found that the COMI shift was made with a view to restructuring the group and hence was in the interests of the group's creditors. The fact that the COMI was moved to Germany with the intention of taking advantage of a more favourable insolvency regime is not in itself abusive but conversely the legitimate exercise of the freedom of establishment. According to the court, an abusive COMI shift implies a fictitious transfer of registered office or of activities aimed at evading creditors' protection.

152. It follows from the above that COMI relocations in the context of insolvency situations is undeniably a reality and debtors in financial trouble will continue to seek the most favourable insolvency regime. Practitioners in insolvency friendly jurisdictions will continue to build on their past experience in designing insolvency restructuring and rescue plans while taking into account the *Interedil* test.

153. It is said that the CJEU rendered the rebuttal of the presumption of article 3(1) of the Regulation more difficult[82] in that it is the perception of third parties as to the location of the central administration and the place where

[82] T. Mastrullo, "Critères et date d'appréciation du centre des intérêts principaux: les précisions de l'arrêt *Interedil* Srl", *op. cit.*

the management decisions are taken that is determinant. For third parties, the central administration is likely to be very often located at the registered office as published in the relevant company's register. The location of the central administration is known to the directors of the company but a third party, being external to the company, is likely never to become aware of a different situation and assume that the central administration is located at the registered office published in the relevant company's register.[83]

154. The rebuttal of the presumption is further hampered by the fact that it is not sufficient to establish that the central administration is not located at the registered office but at some other place. The location of the central administration at such other place must be comforted by other elements such as the location of the assets, the contractual relationship and the business activity and such elements must be transparent enough that third parties are aware of them.

155. Given however that the COMI determination test is a factual test, it is clear from the examples described above that in practice COMI relocations are accompanied by certain steps and measures the purpose of which is to build up a factual case which evidences the COMI shift. These may include appropriate disclosure and communication as to the location of the new central administration and transfers of assets and activities. If the COMI shift is well organised and is not aimed at availing creditors from their protection, the presumption should be as easily rebuttable as before *Interedil*.

§ 3. Abusive COMI relocations vs genuine COMI relocations

156. COMI relocations must be distinguished depending on whether they constitute a genuine relocation or not.

157. According to the Commission's Impact Assessment, forum shopping is problematic where "a debtor takes advantage of a more favourable insolvency regime in another jurisdiction without genuinely relocating to the other Member State, to the detriment of his creditors who are prevented from enforcing their claims". Conversely, "a genuine relocation to another Member State is an exercise of the right to freedom of movement and establishment

[83] M. Menjucq, "Centre des intérêts principaux : les apports de l'arrêt *Interedil* de la CJUE du 20 octobre 2011", *op. cit.*

and justifies the application of the insolvency regime of that other country; a sham move does not".[84]

158. From a creditor's perspective, it must be said that, in most cases and especially in group insolvency situations, creditors are on board. Indeed, most COMI relocations are part of an insolvency strategy negotiated with the debtor's most important creditors.

159. The *Hans Brochier*[85] case was held to constitute a case of abusive forum shopping. At the outset, Hans Brochier, a German construction pipelines business, sought to relocate its COMI using the same route as *Schefenacker* and *Deutsche Nickel*. Hans Brochier GmbH & Co KG (HB GmbH) transferred all its assets and liabilities to Hans Brochier Holdings Limited (HBH) as part of a restructuring under the German law of universal succession. This restructuring occurred in view of the appointment by the directors of HBH of two English administrators on 4 August 2006. They accepted their appointment based mainly on the fact that HBH had its registered office in England and the evidence presented by the directors of HBH from which the administrators inferred that the COMI of HBH was in England. On the same day and in fact 45 minutes after their appointment, a German administrator was appointed upon application of employees of HB GmbH by the court in Nuremberg. The German judge was not aware of the appointment of the two English administrators. The English administrators attended the Nuremberg offices of HB GmbH and learnt new information that made them doubt that the COMI of HBH was in England. Following further consideration, it appeared that although the registered office of HBH was in England (as a result of the above-mentioned reorganisation), its COMI remained in Germany since its head office functions and activities were entirely carried out from Germany.

160. In *Staubitz-Schreiber*, the CJEU distinguished COMI relocations made before and after an application for the opening of insolvency proceedings has been filed. It is only if a COMI shift occurs after the request to open insol-

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84 Commission's Impact Assessment, *op.cit.*, p.21.

85 *Hans Brochier Ltd vs Exner.*, [2006] EWHC 2594 (ch.); W.-G. Ringe, "Forum Shopping under the EU Insolvency Regulation", *op. cit.*; M. Menjucq, R. Dammann, "Regulation No. 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon", *op. cit.*; R. Dammann, G. Podeur, "Procédures d'insolvabilité: interprétation jursiprudentielle souple du règlement", *op. cit.*

vency proceedings but before such proceedings are opened that it would be considered abusive. Indeed, such a COMI shift would be incompatible with the goals of the Regulation in terms of forum shopping, creditor protection and judicial effectiveness.

161. The date of the insolvency application ensures, according to *Staubitz-Schreiber*, "greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him". This is only true, however, if the debtor does not move its COMI after the entry into relationship.

162. In *Interedil*, the CJEU inferred from *Staubitz-Schreiber* that the benchmark date for determining the COMI is the date on which the request for the opening of insolvency proceedings is lodged. It no longer justified its findings by the judicial certainty of creditors or the prevention of forum shopping.

163. The CJEU therefore implicitly accepts COMI shifts up until the date a request for the opening of insolvency proceedings is lodged.

164. The explanation is certainly to be found in the freedom of establishment principle. In the PIN Group, the court found that a voluntary COMI shift one month before the request for the opening of insolvency proceedings was lodged constitutes a legitimate exercise of the freedom of establishment.

165. It follows from the above that COMI relocations will be held to be abusive only in very limited circumstances such as the *Hans Brochier* case, in the case of temporary relocations or if the relocation is done with the purpose of evading creditors' protection. In most instances however COMI relocations are organised in great detail so as to operate a true transfer of COMI ascertainable by third parties and with creditors support.

Sub-section 3
Legal implications of a COMI shift

166. As seen above, there are many examples of Luxembourg-law governed companies that have achieved a successful COMI relocation under the Regulation. What are however the implications of a COMI relocation under Luxembourg corporate law?

§ 1. Determination of the domicile of a company under Luxembourg law

167. Luxembourg law of 10 August 1915, as amended (the "Companies Law"), uses the concept of "central administration" to determine (i) the domicile of a Luxembourg law governed company and (ii) its nationality.

168. Pursuant to article 2 of the Companies Law, the domicile of a commercial company is located at the seat of its central administration. The central administration of a commercial company is presumed to be located at the place of its registered office unless evidence to the contrary is brought.

169. Consequently, a commercial company having its registered office, as shown in its articles of association and published with the Luxembourg trade and companies register, will be domiciled in Luxembourg. If however, evidence can be brought that the central administration of such company is located at a place different to the registered office, e.g. in another country, the presumption laid down by article 2 of the Companies Law will be rebutted and the company may no longer be considered to have its domicile in Luxembourg.

170. This could then have an impact on the nationality of the company. Pursuant to article 159 of the Companies Law, any company whose central administration is located in Luxembourg shall be subject to Luxembourg law, even though the constitutive instrument may have been executed in a foreign jurisdiction.

171. Luxembourg law adheres to the theory of the "real seat" as opposed to the theory of the "incorporation". Consequently, a company having its central administration in Luxembourg will be subject to and be governed by Luxembourg law irrespective of the jurisdiction in which it has been incorporated.

§ 2. The concept of "central administration" under Luxembourg law

172. There is no statutory definition of the concept of "central administration". Its determination is primarily a question of fact.

173. The concept of "central administration" has been introduced in articles 2 and 159 of the Companies Law further to a law of 25 August 2006 implementing the provisions of European Regulation No. 2157/2001 on *sociétés européennes* (the European Company) into Luxembourg law. Prior to this law of 2006, articles 2 and 159 of the Companies Law referred to the concept of "principal establishment".

174. The Regulation on *sociétés européennes* refers to the concept of central administration to determine whether a *société européenne* may participate in the incorporation of a *société européenne* and provides for an obligation on *sociétés européennes* to have their central administration and their registered office in the same country. The preparatory works to the 2006 law indicate that it would not make sense to refer to the concept of central administration in relation to *sociétés européennes* but to maintain the concept of principal establishment for any other type of company. The replacement of the concept of principal establishment by that of central administration in the Companies Law was therefore needed so as to have a uniform concept applying to all commercial companies.

175. It was generally held by case law and legal doctrine that the principal establishment referred to the location of the effective place of management and control of a company. In other words, the principal establishment aims to establish the place of the "real seat" of a company by reference to the place where the strategic decisions affecting the company are effectively taken. Other expressions often used by doctrine to describe the concept of principal establishment are (i) the place where the "brain" of the company is located or (ii) the place where the "intellectual" administration and management of a company takes place, by opposition to the place where the day-to-day management or the operational activities take place.

176. The elements generally taken into account to determine the place of the principal establishment are the place where the board meetings and shareholders meetings are held, the accounts of the company are established and the files of the company are kept.

177. In a case of 28 June 2007,[86] the CJUE held that the concept of "seat of effective management" refers to the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out. The determination of a company's effective management requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the

[86] CJEU, 28 June 2007, case C73-06, *Planzer Luxembourg S.àr.l. vs Bundeszentralamt für Steuern.*

place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking transactions mainly take place, may also need to be taken into account.

178. In a case of 18 April 2008,[87] the Luxembourg district court had to rule on the application of Luxembourg capital duty on an increase of share capital in a company having its registered office in Luxembourg but claiming to have its central administration in the Netherlands. In order to do so, the court had to determine whether the elements of facts were indeed sufficient to establish that the central administration of the company was located in the Netherlands. Luxembourg law on capital duty used the concept of "seat of effective management" of a company to determine whether it was subject to Luxembourg law or not.

179. The court held that the definition of "seat of effective management" given by the CJUE in the case mentioned above could be applied to its case in that it held that the seat of effective management of a company is the place where the essential decisions concerning the general management of a company are adopted and where the functions of its central administration are carried out.

180. The court further indicated that such definition is in line with the definition contained in the preparatory works of Luxembourg law on capital duty which indicate the following: "the concept of 'seat of effective management' is a synonym of 'principal establishment' as referred to in article 159 of the Companies Law. It refers to the place where the centre of the intellectual life of the company is established and from which the management activity is performed, the place where shareholder meetings and board meetings are held, in summary, the place where the superior management activity takes place". The court concluded that the seat of effective management is located at the place where the shareholder resolutions and board resolutions are taken meaning the place where the most important decisions of a company's life are taken.

181. The CJUE's definition distinguishes between the place where the essential decisions are taken and the central administration. The CJUE does however not define central administration nor does it give an indication as to the differences between central administration and the place where the essential decisions regarding the management of a company are taken. One legal author has expressed the view that the concept of central administration

87 T. A. Lux, 18 April 2008, No. 70/2008, RG No. 107.744, available on Legicorp.

corresponds to the place where the management meets and works together which may be different from the place where the strategic decisions are taken (i.e. centre of decision).

182. The Luxembourg court did not distinguish and considered that the "seat of effective management" is the place where the essential decisions for the life of the company are taken i.e. where shareholder and board decisions are held. This is in line with the traditional interpretation under Luxembourg law of the "real seat".

183. This judgement has been confirmed by the Luxembourg Court of appeal and the *Cour de cassation*. The Luxembourg *Cour de cassation* adopted an even simpler approach and held that the fact for a company to hold an extraordinary board meeting in Luxembourg is sufficient to conclude that its central administration is located in Luxembourg irrespective of whether administration activities have taken place in another jurisdiction. This simplistic approach is however criticisable to the extent that it facilitates the establishment of "letter box" entities with fictive seat in Luxembourg. It is clearly not the intention of the Luxembourg legislator to allow the development of "letter box" entities in Luxembourg with no substance at all in Luxembourg.

184. Luxembourg legislation as well as European legislation refer, depending on the subject matter, to a variety of concepts which are not always easy to distinguish and the purpose of which is to determine the applicable law by linking a particular situation to a system of law. Irrespective of whether the concept is called central administration, principal establishment, seat of effective management or otherwise, what is important under Luxembourg law is the determination of the "real seat". The fact that the concept of principal establishment has been replaced by that of central administration in articles 2 and 195 of the Companies Law does, in our view, not change the traditional application of the "real seat" theory under Luxembourg law.

§ 3. "Central administration" under Luxembourg law and COMI shift

185. Given the similarities between the concept of central administration as construed under Luxembourg law and in the context of a COMI determination under the Regulation and the factors taken into account to determine the location of the central administration in both cases, it cannot be excluded that a Luxembourg company would, as a result of a COMI shift, be considered to no longer have its central administration in Luxembourg and therefore lose its Luxembourg-law-governed company status.

186. The central administration of a company in Luxembourg may be challenged either in Luxembourg or abroad if the company while maintaining its registered office in Luxembourg would in fact have its central administration outside of Luxembourg as a result of a COMI shift.

187. Pursuant to article 203 of the Companies Law, the public prosecutor may request the dissolution and the liquidation of any company governed by Luxembourg law that pursues activities contrary to criminal law or which seriously contravenes the provisions of the commercial code or the laws governing commercial companies.

188. It has been held that a company having its registered office in Luxembourg but whose central administration is located abroad could be held to seriously contravene Luxembourg company law if it was considered to constitute a mere "letter box" entity without real attachment to Luxembourg.

189. The Luxembourg legislator was keen to avoid "letter box" situations and, by virtue of a law dated 31 May 1999, has enacted legislation authorising the conclusion of domiciliation agreements whereby a regulated service provider is appointed by a Luxembourg incorporated company to provide registered office services. The service provider is obliged to verify that the central administration of a company to which it provides a registered office has its central administration at the place of such registered office.

190. Also, to the extent that the place of the central administration determines the nationality of a company, a company having its central administration abroad but its registered office in Luxembourg may be re-qualified as a foreign company which could give rise to applicable law issues. In principle, the company would no longer be governed by Luxembourg law and could at the same time not be recognised abroad depending on the laws of the jurisdiction in which it has its central administration.

Sub-section 4

Tax aspects of COMI shifting

§ 1. COMI shift and taxation: setting the scene

191. This part deals with the Luxembourg tax-related aspects of COMI shifting from Luxembourg abroad, with a specific emphasis on migration to the United Kingdom, given the attraction of the UK insolvency proceedings in international bankruptcy and insolvency matters, especially for internationally operating groups of companies. The matters arising from Luxem-

bourg taxation are confronted with principles of EU law[88] and CJEU case law[89].

192. The first finding is that the Regulation does not contain any provision concerning taxes or how to deal with tax matters in such a situation, given the distressed situation of the person undertaking the COMI shift. This does not come as a surprise because even though in some cases, implying cross-border movements of capital and persons, including corporations, the EU Member States have surrendered their respective national tax prerogatives by introducing harmonised regimes of taxation applicable throughout the European Union and in certain cases even beyond,[90] the large area of direct taxation falls within the competence of the EU Member States. However, as spelt out in steady case law of the CJEU, EU Member States must nonetheless exercise that competence consistently with Community law.[91]

193. Given the large number of publications by practitioners concerning concrete cases of COMI shift, what comes as a surprise, however, for the tax

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88 E-J Navez, "Le traitement fiscal du transfert de résidence face à la liberté d'établissement des sociétés en droit de l'UE – de Daily Mail à National Grid", *Cahier de droit européen*, 3/2011, pp. 611 ff; J.-L. Pierre, "Effet du transfert du siège de direction effective d'une société d'un État de l'Union européenne vers un autre État de l'Union européenne", *Droit des Sociétés,* Revue mensuelle Lexisnexis Jurisclasseur, April 2012, pp. 41 ff.

89 CJEU, 29 November 2011, case C-371/10, *National Grid Indus*: "article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Even though, according to their wording, the Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation".

90 By order of priority for corporate tax matters, those are: Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States; Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States; Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC; Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

91 CJEU,11 August 1995, case C-80/94, *Wielockx*; 16 July 1998, case C-264/96, *ICI vs Colmer*; and 29 April 1999, case C-311/97, *Royal Bank of Scotland.*

practitioner is, as a second finding, that only two publications deal with the tax consequences of COMI shifting.[92]

194. The third finding is that for a tax practitioner, a COMI shift is a textbook case for the application of a large number of complex international taxation matters that potentially imply double, or even triple, taxation and that require an advanced interpretation of domestic tax law regulations in the light of tax treaty and EU non-discrimination principles and this despite the fact that the assets that are shifted, or deemed shifted for tax purposes, from one jurisdiction to another (and potentially back), are in principle deeply distressed.

195. As long as there is no EU-wide harmonised framework[93] for a cross-border transfer of the registered office of a company, with the exception in certain cases of the *Societas Europaea* ("SE")[94], given the legal and regulatory difficulties concerning such a transfer, in this chapter COMI shift means the transfer of the effective place of management (the "EPOM")[95], or as it is called under Luxembourg (tax) law, the central administration (so-called "administration centrale")[96] to a jurisdiction, in principle, other than that where the registered office is located for the purpose of opening in that jurisdiction insolvency or restructuring proceedings covered by the Regulation.

196. Since under the Regulation, when different from the registered office (and the jurisdiction in which such registered office is located), the COMI of

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92 W.W. Monteiro R. Van Renselaar, "Fiscale aspecten van COMI verplaatsingen", *Tijdschrift Financiering, zekerheden en insolventierechtpraktijk*, Deel 1, No. 6, September 2012, pp.198 ff; Deel 2, No. 7, October 2012, pp. 238 ff; J. Wheather, "COMI Migration and UK and EU Corporate Tax", *Business Law International*, Vol. 14, No. 3, pp. 261 ff.

93 European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company, OJ of the European Union, C 87E, 1 April 2010; European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats, OJ of the European Union, C 239E, 20 August 2013.

94 Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company and Council Directive No. 2001/86/EC of 8 October 2001 complementing the Statute for a European Company with regard to the involvement of employees in the European company.

95 E. Burgstaller, K. Haslonger, Definition of Place of Effective Management in "Treaty Tie-Breaker Rule Concept, Developments and Prospects", *Intertax*, Vol. 32, Issue 8/9, 2004, pp. 376 ff; S. Shalhav "The Evolution of article 4(3) and Its Impact on the Place of Effective Management Tie Breaker Rule", *Intertax*, Vol. 32, Issue 10, 2004, pp. 460 ff; L. Cerioni, "The 'Place of Effective Management' as a Connecting Factor for Companies' Tax Residence Within the EU vs the Freedom of Establishment: The Need for a Rethinking?", *German Law Journal,* Vol. 13, No. 9, 2012, pp.1096 ff.

96 Luxembourg Income Tax Law of 4 December 1967 (the "LIR"), article 159; Luxembourg Adaptation Law of 16 October 1934, §15(1).

a company is deemed established in the "place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties"[97], this means, from a tax perspective that the EPOM of the company will be transferred to another jurisdiction.

197. Given the factual criteria spelt out for crystallising the COMI in a jurisdiction different from that where the registered office is located[98] and given the publicity advocated[99] to raise awareness of such a shift for the sake of application of the Regulation, one must always bear in mind that amongst the creditors that may be made aware of the COMI shift is on the one the Inland Revenue of the jurisdiction in which the registered office of the company is established; and on the other hand the Inland Revenue of the jurisdiction into which the COMI is transferred. This may, but must not, lead for a taxpayer who is already in a distressed situation to a deemed liquidation for tax purposes[100] so that in the field of taxation virtually all the consequences, which one tends disparately to avoid for corporate law and regulatory purposes, may arise.

198. A company shifting its COMI from one jurisdiction to another jurisdiction while maintaining its registered office in the jurisdiction of departure, is what one calls in international tax language a so-called "dual-resident" company.[101] Moreover, if such a COMI shifting company holds assets in at

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97 Article 3(1), recital 13 of the Regulation.

98 *Cf. supra* Note 76.

99 It may even be seen as a fourth finding for a tax practitioner that normally a dual resident company will be as unobtrusive as possible about such (change in) situation; whereas in the case of a COMI shift, obviously for non-tax reasons, a certain degree of publicity is advocated. This paradox seems to be quite well summarised by reflecting on the words of Professor L. Hinnekens when stating in his article "The Revised OECD-TAG Definition of Place of Effective Management in Treaty Tie-Breaker Rule", *Intertax*, Vol. 31, Issue 10, 2003, pp. 314 ff that "dual residency situations may not occur by chance […] but may [more often than not?] result from a company's aggressive tax planning […]". Indeed, even though it holds true that COMI shifting is (close to) forum shopping, it goes without saying that such forum shopping is in principle not for tax purposes. The tax implications arising from such a dual resident situation are rather a "collateral damage" of the distressed economic and/or financial situation of the company facing difficulties, and, by no means its main purpose.

100 CJEU, 15 July 2004, case C-365/02, *Lindfors*; CJEU, 12 July 2005, case C-403/03, *Schempp*; and CJEU, 20 May 2008, case C-194/06, *Orange European Smallcap Fund*: the "TFEU offers no guarantee to a company covered by article 54 TFEU that transferring its place of effective management to another Member State will be neutral as regards taxation. Given the relevant disparities in the tax legislation of the Member States, such a transfer may be to the company's advantage in terms of tax or not, according to circumstances."

101 A. Schnitger "Fragestellungen zur steuerlichen Behandlung doppeltansässiger Kapitalgesellschaften", *IstR*, 3/2013, pp. 82 ff.

least one jurisdiction other than both that of departure and that of arrival, the dual resident company is involved in one or several triangular cases[102] [103], which presumably is one of the most complex, and thus potentially most detrimental, situations in international taxation. This needs some more explanation around the concept of EPOM and the evolving changes to tie-breaker rules in international tax treaties[104] and their impact on a COMI shift.

§ 2. COMI shift: to tax, not to tax or to defer tax, that is the question…[105]

199. The case law of the CJEU under the circumstances of which the presumption laid down in article 3(1) of the Regulation that the registered office corresponds to the COMI of a company can be rebutted has been examined in great detail above.

200. As indicated in the introductory remarks, as long as there is no EU-wide harmonised regime for a cross-border transfer of the registered office of a company,[106] in light of the existing insurmountable difficulties under corpo-

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[102] For general principles as concerns triangular situations: Prof. Dr. M. Lang, *Liber amicorum J. Malherbes, Triangular situations: Tax treaty entitlement in the source state under EC Law*, Bruxelles, Bruylant, 2006, pp. 685 ff; E. Kemmeren, H.P. Peeters, "Avoidance of Double Taxation and Its Interaction with European Triangular Arrangements", *ec Tax*, No. 1, 2010, pp. 4 ff; O.Mohebati, A.Picard, Q.Donetti "Les relations triangulaires en Droit Fiscal International", *ACE Comptabilité, fiscalité, audit, droit des affaires au Luxembourg*, Kluwer, No. 5, 2013, pp. 3 ff.

[103] For the specific case of dual resident (in) triangular cases: "Dreiecksverhältnisse im internationalen Steuerrecht unter der Beteiligung doppelt ansässiger Kapitalgesellschaften", Dissertation O. Thiessen, *Lang Internationaler Verlag der Wissenschaften*, 2006; E. Fett, *Triangular cases: the application of bilateral tax treaties in multilateral situations*, 5 May 2012, pp. 31 ff.

[104] L. Hinnekens "Revised OECD-TAG Definition of Place of Effective Management in Treaty Tie-Breaker Rule", *Intertax*, Vol. 31, Issue 10, 2003, pp. 314 ff; J-P van der Berg and B. van der Gulik "The Mutual Agreement Tiebreaker OECD and Dutch Perspectives", *Tax Notes International*, Vol. 54, No. 5, 4 May 2009, pp. 417 ff.

[105] The present contribution does not discuss topics concerning valuation of assets at the time of the COMI shift, i.e., whether due to the distressed situation of the company whose COMI is to be transferred or of the group of companies to which it belongs, exit taxation would in any event not have any (material) assessable taxable basis.

[106] Still, one should not be too overly optimistic, once such a harmonised regulation has entered into force. Indeed, even though European Parliament Resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company "notes that a transfer of a company seat should be tax-neutral", the subsequent European Parliament Resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats casts a shadow by spelling out Recommendation 2 (on the effects of a cross-border transfer) that "the transfer should be tax-neutral in accordance with the provisions of [Council Directive 2009/133/EC of 19 October 2009]". It may be recalled that the latter provides in recitals 6 and 7 that "(6) In respect of mergers, divisions or transfers of assets,

rate law and statutes for a company to transfer the registered office abroad without causing damage to the legal existence of the company, a COMI shift will therefore always be organised as a shift of management and control functions into the jurisdiction of destination.

201. In light of the various criteria permitting national courts to establish or refuse establishment of COMI in their respective jurisdictions,[107] it would seem that it does not need any further analysis to conclude that the "place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" to which refers recital 13 of the Regulation corresponds from a tax perspective, including from a Luxembourg tax perspective, to the concept of the EPOM defined under §15(1) of the Luxembourg Adaptation Law[108] and referred to under article 159 of the LIR[109].

202. Article 172(1) of the LIR provides that "when a resident undertaking with a collective character transfers [*both*] its registered office *and* its principal establishment abroad and as a result ceases to be a resident taxpayer" in Luxembourg, the entity is deemed liquidated for Luxembourg tax purposes in accordance with the provisions of article 169 of the LIR.[110]

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such operations normally result either in the transformation of the transferring company into a permanent establishment of the company receiving the assets or in the assets becoming connected with a permanent establishment of the latter company; and (7) The system of deferral of the taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the Member State of the transferring company at the date of their disposal." Thus, even under a harmonised system of transfer of the registered office within the EU, it would seem that taxation will arise, unless assets continue to be allocated to a permanent establishment in the departing jurisdiction.

[107] *Cf. supra* Note 76.

[108] §15(1) Steueranpassungsgesetz of 16 October 1934: "Geschäftsleitung im Sinn der Steuergesetze ist der Mittelpunkt der geschäftlichen Oberleitung." According to the preparatory works to bill of law No. 4588 of 21 December 2001, "le critère de préférence est généralement la notion de siège de direction effective. Cette expression peut être rapprochée de celle de principal établissement visée à l'article 159 LIR. Il s'agit en fait du centre de la direction des affaires. Il faut notamment citer l'endroit où se tiennent les assemblées générales des actionnaires et les réunions des conseils d'administration, où sont prises les décisions stratégiques en matière de gestion et de politique industrielle ou commerciale, où sont tenues les écritures, où se concentre l'activité de conduite des affaires sociales, où se trouvent les bureaux du personnel dirigeant, où se déroulent les activités essentielles de la collectivité. L'appréciation de l'ensemble des critères englobant un faisceau d'éléments détermine l'endroit du siège de direction effective".

[109] F. Haase, "COMI und Forderungsverzicht – Internationales Insolvenz-und Steuerrecht im Spannungsfeld", *IStR* 5/2013, p. 193: " […] hierbei wird deutlich, dass es bei der Definition des [COMI] eine Schnittmenge mit der Definition des Ortes der Geschäftsleitung nach §10 AO gibt".

[110] Article 172(2) of the LIR further specifies that "however, when the assets and liabilities remain attributed to a Luxembourg permanent establishment, the value to attribute can be the book value of the assets, notwithstanding the provisions of art. 169 of the LIR".

203. Article 172 of the LIR states unambiguously that an entity is only deemed liquidated for Luxembourg tax purposes, if both the registered office and the principal establishment, which corresponds to the entity's EPOM, are transferred abroad.

204. Concretely speaking this means that in the case of a COMI shift where, due to corporate law constraints the registered office is maintained unchanged and merely the EPOM is transferred abroad, the COMI shifting entity is not deemed liquidated for Luxembourg tax purposes. It maintains its Luxembourg tax resident status for Luxembourg domestic tax purposes and continues to be subject to unlimited liability to Luxembourg corporation taxes and to Luxembourg tax compliance obligations.[111]

205. From a pure tax technical perspective, this is indeed a mere consequence of the concept of tax residence under Luxembourg domestic tax law.[112] In fact, in accordance with article 159 of the LIR, an entity is considered as a Luxembourg tax resident, if either its registered office or its central administration are located in Luxembourg. An entity can correspondingly only cease to be Luxembourg tax resident, if it transfers both its registered office and its central administration abroad.

206. Thus, it is possible to conclude that the exit from Luxembourg upon COMI shift abroad, is to a large extent a non-event for Luxembourg tax purposes because the entity remains Luxembourg tax resident and thus will continue filing its annual corporate tax returns. Existing tax losses are maintained. Since the entity is still a tax payer in Luxembourg, – subject to DTA tie-breaker rules, – these losses cannot yet be considered as "final losses" in the sense of CJEU case law[113] and as interpreted by national courts.[114]

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111 A.Steichen, "Le siège social au regard du droit fiscal", *Journal des Tribunaux Luxembourg,* 2009, pp. 6 ff; P.J.Wagner "Luxembourg in International Tax Planning", *IBFD*, pp. 454 ff.

112 For the interaction with tax principles contained in double tax agreements concluded by Luxembourg, please see *infra* § 4.

113 *Cf.* German BFH, 9 June 2010 (IR 107/09), stating that "ein Verlustabzug aus Gründen des Gemeinschaftsrechts nur ausnahmsweise in Betracht kommt, sofern und soweit der Steuerpflichtige nachweist, dass die Verluste im Quellenstaat steuerlich unter keinen Umständen anderweitig verwertbar sind. […] Eine derartige 'Finalität' ist gegeben, wenn der Betriebsstättenverlust aus tatsächlichen Gründen nicht mehr berücksichtigt werden kann, z.B. bei Umwandlung der Auslandsbetriebsstätte in eine Kapitalgesellschaft, ihrer entgeltlichen oder unentgeltlichen Übertragung oder ihrer 'endgültigen' Aufgabe".

114 F. Boulogne, N. Sumrada Slavenic, "Cross-border restructuring and 'final losses'", *European Taxation,* October 2012, pp. 486 ff.

Also, no specific tax filing obligations arise upon COMI shifting,

207. To cut a long story short, no exit taxation arises when a Luxembourg undertaking with a collective character shifts its COMI abroad but maintains its registered office in Luxembourg.

§ 3. Tax deferral at exit: from the frying pan into the fire…

208. This may seem to be a good occasion to briefly examine the proposed amendments to the Luxembourg tax deferral provisions of §127 of the Luxembourg General Tax Law of 21 May 1931 (the "Luxembourg General Tax Law"), which have been proposed further to the infringement notification of the EU Commission of 27 September 2012.[115]

209. It is indeed currently proposed to amend this provision[116] in order to provide, among other things, for an unconditional deferral of exit taxes levied under article 172 of the LIR.

210. The new tax deferral regime would, once enacted, allow Luxembourg to proceed with the definitive establishment of the amount of tax at the time when the company transfers both the registered office and the central administration from Luxembourg abroad.[117] Such payment deferral of the taxes arising upon a full exit will be granted unconditionally upon simple request by the taxpayer without late interest and without any guarantee deposit or other security, subject however to annual reporting obligations.

211. Still, it is a mere payment deferral of a tax charge that is definitively crystallised upon exit and whose payment will be deferred merely

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[115] EU Commission, No. 2012/4014 and No. 2012/4015.

[116] Bill of Law No. 6556 of 15 March 2013, which at the date of this contribution had not yet been enacted.

[117] CJUE, 29 November 2011, case C-371/10, *National Grid Indus*: "the Member State of origin complies with the principle of proportionality if, for the purpose of safeguarding the exercise of its powers of taxation, it determines definitively – without taking account of decreases or increases in value which may occur subsequently – the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist. A possible omission by the host Member State to take account of decreases in value at the time of realization of the asset concerned does not impose any obligation on the Member State of origin to revalue at that time a tax debt which was definitively determined at the time when the company in question, because of the transfer of its place of effective management, ceased to be subject to tax in the latter Member State".

until transfer or disposal of the assets (or upon migrating out of the EEE). Such a tax deferral mechanism does seem to comply with CJEU case law though.[118]

212. However, the findings in the more recent *Valle* case,[119] which interestingly concerns Luxembourg tax legislation, seem to shed some new light on the principle that the tax charge is definitively crystallised upon exit.

213. This raises in our view the question of whether the new proposed mechanism of tax deferral under §127 of the Luxembourg General Tax Law is not itself again at odds with EU law principles in that even though it permits to defer taxation from the moment of relocating abroad to the moment of effective transfer or disposal of an asset (or to the moment of relocation outside the EEE), the fact is that the new proposed legislation nevertheless crystallises definitively the deferred tax charge at the time of the migration from Luxembourg to another EU Member State without leaving the possibility to take into account subsequent events that, had the company maintained its registered office or central administration in Luxembourg, would have permitted a lower tax charge than that crystallised upon relocation.

214. In the *Valle* case the CJEU found that Luxembourg infringed the freedom of establishment of a company that relocated its registered office and central administration from Luxembourg abroad by ceasing a previously granted tax reduction even though after the relocation the conditions of the tax advantage continued to be satisfied by that company in the jurisdiction of destination. Indeed, under Luxembourg domestic tax law, the transfer of the registered office and central administration of a Luxembourg company to another EU Member State triggering thereby the immediate withdrawal of the

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118 CJEU, 12 December 2006, case C-374/04, Test Claimants in Class IV of the ACT Group Litigation: "the transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer because […] a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country. In addition, a possible omission by the host Member State to take account of decreases in value does not impose any obligation on the Member State of origin to revalue, at the time of realisation of the asset concerned, a tax debt which was definitively determined at the time when the company in question, because of the transfer of its place of effective management, ceased to be subject to tax in the latter Member State".

119 CJEU, 6 September 2012, case C-380/11, DI. VI. Finanziaria di Diego della Valle & C. SapA; Opinion of Luxembourg State Council on Bill of Law No. 6556 of 22 October 2013.

benefit of a certain net wealth tax reduction;[120] whereas no such withdrawal would have occurred, if that company had continued to have either its registered office or its central administration in Luxembourg.

215. For these reasons, the CJEU concluded that such a difference of treatment with regard to the system of tax reduction may deter companies from transferring their seat to another EU Member State during the compulsory period necessary to benefit from the tax advantage and therefore infringes the freedom of establishment. Unlike a system of exit taxation, which in accordance with the *National Grid Indus* case preserves a balanced allocation of taxation rights among the involved EU Member States, once an EU Member State has granted a tax advantage, it has given up its power of taxation over the income or wealth concerned and therefore can no longer rely on the balanced allocation of taxing rights as a justification for triggering taxation upon exit of a company from its territory.

216. The rationale of a mechanism of withdrawing an advantage implies that the EU Member State had agreed, in advance, to grant that advantage and, consequently, to reduce the tax charge of a resident taxpayer, if the conditions of the tax rule at stake continued to be satisfied. Therefore, an EU Member State that makes the grant of a [tax] reduction conditional upon remaining liable to that tax for a given time period, infringes the freedom of establishment, if such tax reduction ceases upon exit from its territory when the conditions under which such tax advantage are granted continue to be observed by the departing tax payer.

217. Concretely speaking, one may ask therefore whether the proposed draft amendments to §127 of the Luxembourg General Tax Law are in line with the ruling of the CJEU in the *Valle* case or whether, on the contrary, the deferral mechanism and its reporting obligations under §127 of the Luxembourg General Tax Law must necessarily allow the taking into account of events that have an impact on the tax charge crystallised upon exit, which occur subsequently to the relocation *and*, if the tax payer had maintained its registered office or central administration in Luxembourg, would have affected the tax charge. In such a case the crystallised tax charge may then also have to be decreased for any such entity that has ceased to be a Luxembourg tax resident but which remains within the EEE.

[120] Of the Law on Net Wealth tax of 16 October 1934, §8a.

218. One can more precisely think of a participation satisfying the material conditions of the Luxembourg participation exemption regime under article 166 of the LIR but for which at the time of the transfer the compulsory 12-month holding period would not have been satisfied yet but would be satisfied subsequently in the EU Member State of relocation.[121]

§ 4. COMI shift and tax treaty tiebreaker provisions: set and (mis) match?

219. As seen above, under Luxembourg domestic tax law, an undertaking with a collective character is considered as a Luxembourg tax resident, if either its registered office, or its central administration (or both) are located in Luxembourg.

220. If a Luxembourg company now shifts its COMI to another jurisdiction with which Luxembourg has concluded a comprehensive double taxation agreement ("DTA"), one must consider that the registered office remains in Luxembourg but that the EPOM of that entity is located in this other country, given also the emphasis that such an entity will put on raising awareness of that shift so that its COMI is properly established in the jurisdiction of choice for the purposes of the Regulation.

221. If such a DTA follows the OECD-Model Convention, it will presumably contain a traditional article 4 OECD Model-Convention-like tie-breaker clause that states that "where [...] a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its EPOM is situated".

222. In light of the overruling international public (tax) law *pacta sunt servanda* – in principle meaning that treaty law prevails over domestic law – the question that arises in such a situation is whether the DTA tax resident determination, (i.e., under the tie-breaker, the entity is a resident in Contracting State A only (and not in B) because its EPOM is located there) is only applicable for DTA purposes; or whether, on the contrary, such DTA determination also affects the analysis under domestic tax law and statutes of the Contracting States A and mainly Contracting State B.

223. If the answer to this question is "yes", this would mean that the entity at stake is a resident of the Contracting State where the EPOM is located and

[121] From National Grid Indus to DI. VI. Finanziaria di Diego della Valle & C.: "another step forward for companies wishing to move within the EU", S. Douenias, I. Palieri, Kluwer, *ACE Comptabilité, fiscalité, audit, droit des affaires au Luxembourg*, No. 10, 2012, pp. 19 ff.

has become a non-resident of the other Contracting State. Depending on the domestic tax law provisions of that other Contracting State, the entity could then be deemed liquidated for domestic tax law purposes.

224. If the answer to this question is "no", this would mean that the entity at stake is, for the purposes of the bilateral DTA, only a resident of the Contracting State where the EPOM is located but remains in accordance with the laws and statutes of the other Contracting State,[122] a tax resident for the purposes of domestic tax law and for the purposes of any such other DTAs.

225. Fortunately for COMI shifting entities, Luxembourg has never crossed this line. Despite a (definitively?) aborted attempt in 2001 when a bill of law had *in extremis* been amended accordingly and thus had not become law,[123] Luxembourg, in accordance with articles 159 and 172 of the LIR, continues to consider an entity that is a Luxembourg tax resident under Luxembourg domestic tax law but that under the DTA tie-breaker provisions of another Contracting State is a resident in that other Contracting State remains from a Luxembourg perspective nevertheless – and despite such DTA provisions – a Luxembourg tax resident company for all other purposes, because its registered office continues to be located in Luxembourg.

226. Concretely speaking, this means that a Luxembourg company that transfers its COMI, and thus its EPOM, from Luxembourg into another jurisdiction whether that other jurisdiction does have, or on the contrary, does not have a DTA with Luxembourg, remains a Luxembourg tax resident company.

227. This, among other things, holds true for the tie-breaker rule under article IV(3) of the Luxembourg-United Kingdom DTA of 20 February 1969, as

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[122] And thus in accordance with DTA provisions with Contracting States other than the Contracting State where the EPOM is located.

[123] According to the preparatory works to Bill of Law No. 4588 of 21 December 2001: "suite à l'amendement de l'actuel article 159 LIR, il ne suffit plus qu'un [organisme à caractère collectif] ait soit son siège social, soit son principal établissement au Luxembourg, pour que l'on puisse la considérer comme contribuable résident. En effet, lorsqu'une société a son siège social au Luxembourg, alors que son principal établissement se trouve dans un autre État, ou vice versa, on doit d'abord examiner si le Luxembourg a conclu une convention tendant à éviter les doubles impositions avec cet autre État. Dans l'affirmative, ce sont les dispositions de la convention qui déterminent l'État de résidence de la société. En l'absence de convention, la société est toujours à considérer comme contribuable résident du Luxembourg. Par conséquent, puisqu'il est possible qu'une société résidente devienne non résidente tout en conservant soit son siège social, soit son principal établissement au Luxembourg, le nouvel alinéa 1er de l'article 172 LIR prévoit que si une société résidente devient non résidente parce qu'elle transfère son siège social et/ou son principal établissement à l'étranger, le changement de résidence est assimilé à la liquidation de la société".

amended, that considers under a traditional EPOM-tiebreaker provision that for the purposes of the DTA a company is tax resident in the jurisdiction where its EPOM is located.

§ 5. MAP:[124] a chill factor for COMI shifting?

228. This brings us to the final topics of this chapter that the changing technique for determining DTA tax residency, consisting of a switch from the traditional article 4(3) OECD Model convention "EPOM"-tiebreaker to a mutual agreement tiebreaker under which both Contracting States determine the DTA tax residence of a dual resident (company) by mutual understanding. It is noteworthy that only in cases of dual resident individuals, an obligation exists for the competent authorities of the Contracting States to reach an agreement.[125]

229. In a situation like a COMI shift where predictability of applicable legal, regulatory and thus also tax treatment is key to permitting the distressed operator to get back to business and to accomplish with success the very formalistic pre-pack proceedings or scheme of arrangements, it would at first sight seem that if the COMI shift was into a jurisdiction that had concluded a

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[124] "MAP" stands for "Mutual Agreement Procedure"; *cf.* paragraph 24.1 of the Commentary on the OECD Model Tax Convention on Income and Capital 2010: "where […] a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States. Competent authorities having to apply such a provision to determine the residence of a legal person for purposes of the Convention would be expected to take account of various factors, such as where the meetings of its board of directors or equivalent body are usually held, where the chief executive officer and other senior executives usually carry on their activities, where the senior day-to-day management of the person is carried on, where the person's headquarters are located, which country's laws govern the legal status of the person, where its accounting records are kept, whether determining that the legal person is a resident of one of the Contracting States but not of the other for the purpose of the Convention would carry the risk of an improper use of the provisions of the Convention etc. Countries that consider that the competent authorities should not be given the discretion to solve such cases of dual residence without an indication of the factors to be used for that purpose may want to supplement the provision to refer to these or other factors that they consider relevant".

[125] It is to be noted that Luxembourg has introduced into recent international tax agreements such a mutual agreement tiebreaker provision, namely the addendum to the Luxembourg-Russia DTA of 28 June 1993 and the (draft) international tax agreement with Taiwan include such a MAP-provisions.

DTA with a mutual agreement tiebreaker, the mere fact that the DTA tax residence is to be determined by the Contracting State by way of a MAP and thus no agreement may be reached should be considered as a factor of uncertainty that must be avoided at all costs.

230. However, if MAP does not produce a result, this would mean that the entity concerned would be considered as or, more precisely, would remain, a tax resident of both Contracting States which after all may not necessarily be disadvantageous in relation to the entering into the restructuring proceedings. The fact that no agreement is reached or that no MAP is initiated does not mean that the entity concerned loses its (respective) domestic tax resident status.[126]

231. It would therefore seem possible to conclude that a COMI shift by a Luxembourg entity to a jurisdiction that has entered into a DTA with a mutual agreement tiebreaker with Luxembourg is not a factor of uncertainty or instability that would weaken the restructuring procedure upfront.

232. This is indeed an important finding, given that treaty negotiations seem to be going on for some time between Luxembourg and the United Kingdom to enter into a new DTA, and given also that the United Kingdom, in the same way as Luxembourg recently, has already entered into a certain number of DTAs that contain such MAP provisions to determine DTA residence.[127]

233. It can therefore not be excluded that under the new Luxembourg-United Kingdom DTA, the current traditional article IV(3) EPOM-tiebreaker could be replaced by a mutual agreement tiebreaker. As seen above, this should not weaken the tax position of the COMI shifting Luxembourg entity in the restructuring proceedings, but it may, however, have an impact if subsequent proceeds flow through the structure and triangular cases would appear.[128]

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[126] J-P van der Berg and B. van der Gulik, "The Mutual Agreement Tiebreaker OECD and Dutch Perspectives", *Tax Notes International*, Vol. 54, No. 5, 4 May 2009, pp. 417 ff: it is shown in a quite convincing manner that even though the rationale of the mutual agreement tiebreaker seems to be to discourage tax planning with dual resident companies, it would seem at first sight that neither the two Contracting States nor the taxpayer himself would have an active interest in starting to initiate the MAP.

[127] G. van Gelder, "UK Treaty Tiebreaker Guidelines Raise Concerns", *Tax Notes International*, Vol. 69, No. 4, 28 January 2013, pp. 326 ff.

[128] Deloitte International Tax Alert of 25April 2008: "in this context, the OECD explicitly has expressed the view that a company that has unlimited liability to tax under the domestic law of State A, and that liability is eliminated (because the company is effectively managed in treaty State B) cannot invoke the benefits of a tax treaty that State A has concluded with a third state. The OECD believes this because tax technically, companies (and persons in general) that are subject

Chapter 2
The modernisation of the European Regulation No. 1346/2000 on insolvency proceedings

Although the Regulation is generally regarded as a successful instrument for the coordination of cross-border insolvency proceedings in the European Union, the consultation of stakeholders and legal and empirical studies commissioned by the European Commission have acknowledged the practical problems encountered by the courts to determine where the debtor's COMI is located. Consequently, the Proposal aims at clarifying the jurisdiction rules in light of the criteria developed by the CJEU (1), and improve the procedural framework for determining jurisdiction rules in order to discourage so called abusive relocations of COMI[129] (2).

234. In addition, the Proposal has responded to the issue posed by the insolvency of group of companies, which has been acknowledged by the European Commission under the following terms: the lack of specific provisions for group insolvency often diminishes the prospects of successful restructuring of the group as a whole and may lead to a break-up of the group in its constituting parts.[130] In fact, the Proposal has created a specific legal framework which notably promotes the co-operation and communication between courts and insolvency practitioners in relation to the different members of a group of companies in such a way that is similar to the coordination which should take place between main and secondary proceedings[131] (3).

Section 1
Clarifications of the jurisdiction criteria : incorporation of the CJEU ruling

235. With respect to the jurisdiction rules, the Proposal does not overhaul the fundamental structure of article 3(1) of the Regulation, but rather clarifies the content of the COMI concept with respect to companies and the circum-

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to worldwide taxation under the domestic tax law of State A, but whose comprehensive liability to tax disappears as a result of a tax treaty with State B, are or could then not be considered as 'resident' for purposes of State A's other DTA (than that with State B). This change would, amongst other things, have an effect on withholding taxes in triangular situations".

[129] See the Proposal p. 5 and see the first part of this article, Chapter 1, Section 2, Sub-section 2, §3).

[130] See the Proposal p. 3.

[131] See the Proposal p. 10.

stances to rebut the presumption that the COMI of a company is located at the place of its registered office (see Sub-section 1 below). The Proposal also specifies the scope of the competent jurisdiction for the related actions (see Sub-section 2 below).

Sub-section 1

Insertion of COMI case law criteria in the Regulation to clarify the COMI concept

§ 1. Renewal of companies' COMI concept

236. Presently, the Regulation does not contain any specific definition of COMI and solely provides for a presumption that the COMI of a company is located at the place of its registered office. Moreover, the explanations of the concept only appear as a recital (13), which clarifies the fact that COMI should correspond to the place where the company "conducts the administration of its interest on a regular basis and is therefore ascertainable by third parties".[132]

237. As mentioned in the first part of this article, the absence of a definition of COMI has led domestic courts to adopt a broad interpretation of the COMI concept allowing the relocation of debtors to so called "insolvency friendly" jurisdiction, which has given rise to criticism from a part of the doctrine. The CJEU, in the decision *Eurofood* and *Interedil*, developed a restrictive interpretation of the COMI concept.

238. The Proposal suggests that the COMI concept should be maintained but that some details should be added to its meaning to provide more guidance to the national courts. In this respect, the current definition provided for recital 13 is integrated in article 3 of the Regulation, and is more or less identically worded: the COMI "shall be the place where the debtor conducts the administration of his interests on a regular basis *and* which is ascertainable by third parties".

239. The interesting point to note is that the adverb "therefore" has been removed and replaced by the conjunction "and". This replacement significantly means that two cumulative conditions shall be fulfilled in order to determine the jurisdictional competence,[133] i.e. (i) place of administration of the debtor's interests on a regular basis and (ii) ascertainability by third parties.

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[132] See paragraph 14 above.

[133] See, R. Dammann, V. Bleicher, "En route vers la modernisation du règlement européen relatif aux procédures d'insolvabilité", *op. cit.*, and J.-L. Vallens, "La révision du règlement communautaire No. 1346/2000 du 29 mai 2000 sur les procédures d'insolvabilité", *op. cit.*, p. 316.

240. Unfortunately, the Proposal did not insert a proper definition of the COMI concept in article 2 "Definitions" as had been recommended in the EP Recommendations[134] and in the INSOL Proposal.[135] The latter would have simplified and rendered more coherent its interpretation.

§ 2. Clarifications of the circumstances in which the presumption in favour of the place of registration can be rebutted

241. The Proposal maintains for companies the rebuttable presumption in favour of the place of its registered office but specifies the circumstances in which this presumption can be rebutted. The new recital 13(a) provides that "it should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by the third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties".

242. It follows from the above that the Proposal codified the solutions laid down in the *Interedil* case and, like the CJEU, preferred not to apply the general and vague criterion of the "business" test inferred from the *Eurofood* case.[136] It

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[134] See the EP Recommendations, p. 11.

[135] See article 2(a) of the INSOL Proposal which provides that "Centre of main interests shall mean in the case of companies and legal persons, the place of the registered office, except that, (i) where the operational head office functions of the company or legal person are carried out in another Member State and that other Member State is ascertainable to actual and prospective creditors as the place where such operational head office functions are carried out, it shall mean and refer to the Member State where such operational head functions are carried out and (ii) where the company or legal person is a mere holding company or mere holding legal person, within a group with head office functions in another Member State, the centre of main interests as defined in the previous sentence is located in such other Member State. The mere fact that the economic choices and decisions of a company are or can be controlled by a parent company in another Member State than the Member State of the registered office does not cause the centre of main interests to be located in this other Member State. In the case of individuals, the centre of main interests shall mean the place of habitual residence, except that in case of professionals it shall be the professional's principal office or principal location from which his profession is conducted."

[136] See G. Minne, "Arrêt Interedil: la Cour de justice de l'Union européenne clarifie le contenu des notions de 'centre des intérêts principaux' et 'd'établissement' du règlement No. 1346/2000 relatif aux procédures d'insolvabilité", *op. cit.*, p. 63; F. Fayot, C. Martins Costa, "Chroniques Droit des sociétés (2006-2012)", *op. cit.*, p. 303. See paragraph 97 above about the possibility to consider that CJEU established a "business" test in its *Eurofood* decision.

thus remains that the debtor's COMI must be determined by attaching greater importance to the place of the company's central administration, established through objective elements that shall be ascertainable by third parties.[137]

243. The Proposal describes the task of national judges trying to assess the COMI that leads to determine two different hypotheses based on the knowledge of third parties, and particularly the creditors of the place where the central administration is located and where the management decisions are taken:

> *either* the company's management and supervision bodies as well as its management decisions are located and taken in the same place as its registered office in a manner that is ascertainable by third parties. Therefore, the presumption that the debtor's COMI is located at its registered office is fully applicable,[138]
> *or* the company's centre of management and supervision and of the management of its interest does not coincide with its registered office. In such case, the presumption may be rebutted if factors, which are both objective and ascertainable by third parties, confirm that the central administration is located in another place.[139]

244. In light of the foregoing considerations, various remarks can be made.

245. Firstly, the Proposal does not provide for a list of key features capable of identifying the COMI, such as (i) "the externally ascertainable principal transaction of business operations, (ii) the location of assets, (iii) the centre of the operational or production activities, (iv) the workplace of employees", as defined in the EP Recommendations.[140]

246. Therefore, the COMI shall be determined in accordance with the CJEU *Interedil* case, i.e. by a complex bundle of factors both objective and ascertainable by third parties, which shall be assessed in a comprehensive manner and by taking into account the individual circumstances of each particular

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[137] See *Interedil, op. cit.,* §48, 15 December 2011, case. C.-191/10, *CJUE Rastelli*, §32; R. Dammann, F. Muller, "Coup d'arrêt de la CJUE au mécanisme de l'extension de procédure en cas de confusion des patrimoines", *D.,* 2012, pp. 406 ff; F. Mélin, "Confusion de patrimoines et société située à l'étranger", *JCP G*, 2012, pp. 616 ff; N. Morelli, "Confusion des patrimoines et règlement 1346/2000: sans COMI en France, pas d'extension de procédure", *Rev. soc.*, 2012, pp. 313 ff; J.-L. Vallens, "Extension d'une procédure collective à une société étrangère: localisation du centre des intérêts principaux en France", *D.*, 2012, pp. 403 ff.

[138] See, *Interedil*, *op. cit.*, §50, and Rastelli, *op. cit.*, §34.

[139] See *Eurofood*, *op. cit.*, §34, *Interedil*, *op. cit.*, §51, Rastelli, *op. cit.,* §35.

[140] EP Recommendations, §2.2.

case as more fully described in paragraph.[141] The requirement of objectiveness and ascertainability is necessary "to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings".[142]

247. Secondly, the Proposal does not use the same terminology in recital 13(a) "the company's central administration" and in article 3(1) "the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties" which does not help in reducing uncertainties in the interpretation of the COMI concept as previously highlighted.

248. Finally, the Proposal does not solve all the difficulties arising from the interpretation of the COMI concept. In particular, it does not distinguish between holding and operational companies, which for Luxembourg would have been interesting. However, as mentioned in the External Evaluation,[143] the "pertinent factors in determining the COMI depend on the debtor's type of business and the situation may be more complicated if the holding company and the factories are located in a different Member State".[144]

249. In this respect, INSOL Europe proposed to insert in article 2 of the Regulation a definition of the COMI with specific provisions dealing with mere holding companies. In accordance with article 2(a) of the INSOL Proposal: "Centre of main interest shall mean in the case of companies and legal persons, the place of the registered office, except that, (i) where the operational head office functions of the company or legal person are carried out in another Member State and that other Member State is ascertainable to actual and prospective creditors as the place where such operational head office functions are carried out, it shall mean and refer to the Member State where such operational head office functions are carried out and (ii) where

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[141] See *Interedil, op. cit.*, §52. As a possible example of the rebuttal of the presumption, the CJEU cited the case of a letterbox company that does not carry out any business in the territory of the Member State in which its registered office is situated (see *Eurofood, op. cit.*, §§34 and 35). Similarly, if a company has, in a Member State, other than that of its registered office, immovable property, a lease agreement concluded by the debtor company with another company, and contracts with banks submitted to another law other than the one of its registered office, there are not sufficient factors to rebut the presumption laid down in article 3(1) of the Regulation (see *Interedil, op. cit.*, §53).

[142] *Eurofood, op. cit.*, §33, Rastelli, *op. cit.*, §49.

[143] See the External Evaluation, p. 106.

[144] See, for an example of difficulties that can be encountered, BenQ Amsterdam District Court, 28 February 2007, *NIPR*, 2007, 139, cited in the External Evaluation, p. 107.

the company or legal person is a mere holding company or mere holding legal person, within a group with head office functions in another Member State, the centre of main interests as defined in the previous sentence is located in such other Member State. The mere fact that the economic choices and decisions of a company are or can be controlled by a parent company in another Member State than the Member State of the registered office does not cause the centre of main interests shall mean the place of habitual residence, except that in case of professionals it shall be the professional's principal office or principal location from which his profession is conducted."[145] INSOL Europe commented that the "exception with respect to these mere holding companies/legal persons is included in order to prevent the possibility that, if any such mere holding company is the ultimate parent company as in article 3(n), the group main proceedings will be located in a Member State with which the group has no actual connection".[146]

250. On the one hand, if a Luxembourg national court analyses the case of a Luxembourg holding company (i.e. a company holding only participations without loans granted by third parties with a pledge on the shares of its subsidiary), it would certainly determine that its COMI is located in Luxembourg as its central administration is in Luxembourg and as this fact is ascertainable by third parties (tax administration, Luxembourg directors, etc.). In this case, it would also be difficult for another Member State court to rebut the presumption established in favour of the place of the registered office.

251. On the other hand, if the Luxembourg company is a holding company business, i.e. a company holding participations and generally having granted security to lenders on the shares of its subsidiary situated in another country, the Proposal will not really change the determination of its COMI. This issue is particularly well illustrated in the *Coeur Défense* French case.[147] The criteria used by the French Court of appeal, to justify that the COMI was located in France, consisted in the ascertainability by third parties of (i) the place where the main transactions involving the Luxembourg company had been signed, (ii) the place of all negotiations, (iii) the law governing the pledge over the sole

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[145] INSOL Proposal, p. 29.

[146] See INSOL Proposal, p. 36, §2.10.

[147] CA, Versailles, 19 January 2012, RG No. 11/03519: *Bull. Joly Soc.* 04/2012, p. 329, note R. Dammann, L. De Germay. In this case, the issue was to determine whether the meeting place of the management bodies of the company (located in Luxembourg) or the place of the conclusion of main contracts with third parties (in France) should prevail in case of dissociation between them, See about this issue, R. Dammann, A. Albertini, "L'arrêt Interedil de la CJUE: notion de centre des intérêts principaux", *op. cit.*, 1309, see also paragraph 53 above.

subsidiary shares for an amount of about EUR 1.6 billion, and (iv) the jurisdiction chosen for this pledge. The French court considered that (i) Paris was the place where the agreements were negotiated and signed and (ii) this place was ascertainable by third parties, as the COMI, i.e. by creditors who signed the various agreements.

252. In the case at hand, we are of the opinion that the Proposal would not have changed the determination of the COMI for the French courts. However, if the contractual relationships between the Luxembourg holding company and the lenders had been negotiated and entered into by Luxembourg based directors in Luxembourg and if the pledge had been governed by Luxembourg law, the COMI could have been located in Luxembourg at its registered office. The latter would have occurred even if in practice the same structure was used, i.e. a Luxembourg holding company with a French subsidiary holding real estate in France.

Sub-section 2
Clarification of jurisdiction for related actions

§ 1. Codification of case law on via attractiva concursus principle

253. The Proposal completes the jurisdiction criterion COMI by a new provision addressing the *via attractiva concursus* principle,[148] established in the *Seagon/Deko Marty,*[149] *SCT Industri* and *German Graphics*[150] CJEU case law

[148] See P. Ehret, "La CJCE instaure le principe 'vis attractiva concursus' concernant les actions révocatoires au niveau communautaire", *Rev. proc. coll.,* No. 2, March 2009, study 7; R. Dammann, V. Bleicher, "French Perspective on the Modernisation of the European Regulation No. 1346/2000 on Insolvency Proceedings", *op. cit.*, p. 14; M. Menjucq, "La proposition de règlement modifiant le règlement (CE) No. 1346/2000 sur les procédures d'insolvabilité: une évolution mais pas une révolution", *op. cit.*

[149] CJEU, 12 February 2009, case C-339/07, *Seagon vs Deko Marty Belgium NV*, [2009] ECR I-00767, *JCP E,* 2009, 1482, note F. Mélin; *D.* 2009, p. 1311, note J.-L. Vallens; *RTD com.*, 2010, p. 211, note J.-L. Vallens. In this decision, the CJEU interpreted article 3 of the Regulation in light of article 25 and decided that this article must be interpreted as meaning that it also confers international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them.

[150] CJEU, 2 July 2009, case C-111/08, *SCT Industri AB i likvidation vs Alpenblume AB*, [2009], *ECR I*-05655; CJEU, 10 Sept. 2009, case C-292/08, *German Graphics Graphische Maschinen GmbH vs Alice van der Schee*: [2009], *ECR I*-08421, *JCP E*, 2009, 1927, *Rev. Lamy dr. civ.*, April 2010, No. 70, p. 31, note R. Dammann, S. Millet. The CJEU held in these cases that the court opening insolvency proceedings had jurisdiction for avoidance actions brought by the liquidator against a third party, such as an action seeking to invalidate a transfer of shares executed in the

with respect to recognition. Article 3(a) of the Proposal thus provides that: "The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them" and that "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

254. As a consequence, actions that derive directly from the insolvency proceedings and which are closely linked to those proceedings, such as actions to set aside or for the repayment of liabilities[151] shall fall within the scope of the Regulation, whereas the other civil and commercial actions shall fall within the scope of the Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "44/2001 Regulation")[152].

§ 2. Possibility to cumulate insolvency related actions with actions based on civil law

255. In relation to insolvency proceedings in the context of which civil or commercial actions are brought, the Proposal allows derogating from the rules of exclusive jurisdiction of the court opening the proceedings. Indeed, in accordance with article 3(2), the liquidator may bring both actions in the court opening the insolvency proceedings or in the courts of a Member State where the defendant is domiciled. As a consequence, the Proposal differs from the *Deko Marty* case law that prescribed exclusivity of jurisdiction in such cases.[153]

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context of insolvency proceedings and that such actions were excluded from the scope of the 44/2001 Regulation. However, an action brought by a vendor on the basis of a reservation title against an insolvent purchaser does not fall under the scope of the Regulation.

[151] See CJEU, 22 February 1979, C-133/78, *Gourdain Nadler*, *RCDIP*, 1979, p. 657, comment J. Lemontey.

[152] Regarding the actions that should not fall within the scope of the Regulation: reservation of title (CJEU, 10 Sept. 2009, case C-292/08, *German Graphics Graphische Maschinen GmbH vs Alice van der Schee).* See also, CJEU, 19 April 2012, case C-213/10, *F-Tex SIA vs Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, (action Pauliana based on a claim against third parties assigned by the liquidator to the sole creditor cannot be qualified as closely linked to the insolvency proceedings).

[153] See R. Dammann, V. Bleicher, "French Perspective on the Modernisation of the European Regulation nº 1346/2000 on Insolvency Proceedings", *op. cit.*, p. 14.

256. The Proposal is consistent with the idea of simplification and standardisation of procedures and of having the scope of the Regulation clearly defined towards Regulation No. 44/2001.

Section 2

Inclusion of provisions restricting Insolvency Tourism

257. As mentioned by M. H. Eidenmüller, the COMI concept is "a fact-sensitive criterion, and the facts can be changed or manipulated".[154] COMI relocations carried out to benefit from a more favourable insolvency regime in another jurisdiction are not merely hypothetical. As previously mentioned recent case law provides interesting illustrations of disputes associated with the use of such a procedural strategy in the European Union.[155]

258. The issue of a potential misuse of rights in respect of a COMI shift gives rise to interesting questions in relation to, on the one hand, the conflicting priorities between the debtor's freedom of establishment guaranteed by the Treaty on the Functioning of the European Union and creditor protection and, on the other hand, the avoidance of forum shopping which is addressed in recital 4 of the Regulation. The relocation of a company's COMI from one Member State to another is certainly protected under the freedom of establishment and is not generally considered abusive.[156] However, in the event that a COMI shift occurs shortly before the filing for insolvency proceedings, creditors that have obtained claims against the debtor prior to such a shift, should be protected against its effects which may be detrimental to them.

259. The increasing number of insolvency tourism cases in the European Union can be attributed to various reasons. Most of them are not directly related to insolvency. In fact, COMI shifts may be driven by the desire to benefit from better market conditions, working opportunities, and the company law of another country.[157] In relation to insolvency, the main reason consists in the lack of a harmonised insolvency regime among the different Member States. Indeed, "Members States' insolvency laws and proceedings vary consid-

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[154] H. Eidenmüller, "Abuse of law in the Context of European Insolvency Law", *ECFR*, 1/2009, p. 3.

[155] See for comments about those decisions, paragraphs 136 and following of the first part of this article.

[156] See for an overview of the CJEU's case law regarding the principle of freedom of establishment, paragraphs 118 ff of the first part of this article.

[157] See the Commission Staff Working Document, accompanying the revision of the Regulation dated 12 December 2012, SWD (2012) 416 final, pp. 20 and 21.

erably and offer a range of advantages and disadvantages to companies"[158](or to creditors) (see below, Sub-section 1). In this respect, the European Commission proposes some useful procedural changes to discourage the incentives the parties can benefit from when transferring assets or judicial proceedings from one Member State to another, thus seeking to obtain a more favourable legal position (see below, Sub-section 2). Nevertheless, the Proposal does not provide for institutionalised anti-abuse rules (see below, Sub-section 3).

Sub-section 1

Reasons for the increase of insolvency tourism since the entry into force of the Regulation

260. The Regulation was adopted to deal with issues of cross-border insolvency through the proper recognition and coordination of national insolvency proceedings and in order to avoid the so-called "abusive relocation of COMI". However, the Regulation does not harmonise national insolvency laws. As a consequence, "economic activities may be lost, creditors recover less than they otherwise would, and creditors from different Member States are not treated equally".[159] In its communication dated 12 December 2012, the European Commission highlighted areas where differences between national insolvency laws had the potential to hamper the efficiency of the European Union's insolvency legal framework. It proposed changes to improve the rescue and recovery culture across Member States.[160] To achieve this general objective, it analysed the economic impact of legal and administrative procedures for licensing, business transfers and bankruptcy on entrepreneurship in Europe, and enclosed in Appendix III an analysis of various national bankruptcy systems.[161]

261. One interesting feature of this analysis consists in classifying countries as debtor- or creditor-friendly Member States or neutral. According to this classification, England has an attractive creditor insolvency system, France has a debtor-friendly one,[162] and Germany a neutral one. Luxembourg was

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158 *Ibid.*, p. 21.

159 See COM (2012) 742 final, *op. cit.*, p. 2.

160 *Ibid.*

161 See European Commission, "The economic impact of legal and administrative procedures for licensing, business transfers and bankruptcy on entrepreneurship in Europe", *op. cit.*

162 France was classified as a debtor-friendly insolvency system notably because of the safeguard proceedings that allow debtors to continue ongoing concerns without having the creditors draw their sword of Damocles and exercising their pledge according to the EC/2002/47 Directive of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

not classified in any of these categories. Although it is far-fetched to classify Luxembourg as a totally unfriendly jurisdiction in terms of insolvency, it is certainly true that neither a debtor nor a creditor will choose it as an insolvency jurisdiction destination. Considering that up to now only one or two reorganisation procedures per year take place, Luxembourg cannot be considered a pioneer in pre-insolvency and restructuring procedures, mainly due to the fact that Luxembourg law does not provide an efficient insolvency legal framework in that area. Nonetheless, the situation should probably change in the near future with the new pre-insolvency and restructuring procedures provided by the Luxembourg Bill of Law No. 6539 on 1 February 2013 (the "**Bill**") regarding the protection of undertakings and modernisation of the insolvency law,[163] which will put in place a set of pre-insolvency rules.[164] The Bill provides for new proceedings such as *Conciliation*[165] and *Accord Amiable,*[166] and *Réorganisation Judiciaire.*[167] Largely inspired by Belgian law, the bill is a first step in bringing Luxembourg in line with the European Commission's analysis. Therefore, Luxembourg could become a jurisdiction of interest for companies in financial trouble.

262. For the time being, COMI shifts from one Member State to Luxembourg are extremely rare. To the best of our knowledge, the sole case law concerns the COMI shift of the company *Metro Office* from England to Luxembourg.[168] Thus, in a recent decision rendered on 9 May 2012, the English court acknowledged the COMI shift to Luxembourg but refused the opening of secondary proceedings in the jurisdiction of *Metro Office*'s registered office despite the willingness of some creditors to use the extensive English claw-back period of 2 years (compared to six months in Luxembourg) to set aside some transactions. According to this COMI shift, Luxembourg law could be viewed as a debtor-friendly country. However, *Metro Office*'s bankruptcy has not been closed in Luxembourg and it is difficult to establish a proper opinion without the real facts at hands.

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163 Bill (*projet de loi*) No. 6539 regarding the protection of undertakings and modernisation of the insolvency law.

164 See about this Bill, M. Gerber-Lemaire, C. Dumont, "Luxembourg: can you see the light at the end of the tunnel. Report on the modernization of insolvency law", *Eurofenix*, Autumn 2013, pp. 40 to 43.

165 Article 9 of the Bill.

166 Article 11 of the Bill.

167 Articles 12 and following of the Bill.

168 *Trillium (Nelson) Properties Limited vs Office Metro Limited Royal Courts of Justice Strand*, London, WC2A 2LL, 9 May 2012, Case No. 8703 OF 2011. See about this decision, paragraphs 145 and 146 of the first part of this article.

263. In addition, according to case law of different Member States, to date no Luxembourg company has registered a COMI shift to France. Senior creditors generally prefer to transfer assets or judicial proceedings to England due to its flexible company restructuring regime and particularly the pre-packaged administration sales that enable a company to restructure by eliminating some of its creditors and converting into a new company shorn of its liability.

264. In terms of COMI shifts, it is difficult to determine the most efficient insolvency system,[169] perhaps it could be a system that mixes debtor friendliness with creditor control. Many new insolvency regimes are arising in the European Union, with rules mainly focusing on pre-insolvency and reorganisation measures. Given the abundance of new regimes, debtors and creditors will certainly be able to choose the one that allows saving fully or partially the debtor's activities and which at the same time avoids cheating creditors. Therefore, it is important to assess whether the Proposal will be sufficiently firm and efficient in allowing national courts to have a uniform and objective approach to the COMI concept.

Sub-section 2

Improvement of procedural framework to determine jurisdiction

265. The Proposal provides for a duty on the court that opens the insolvency proceedings to examine the COMI of the debtor and specify the grounds on which it determines jurisdiction (§ 1) and also a right for foreign creditors to challenge the court's decision (§ 2).

§ 1. Ex officio examination by opening court or body

266. One of the most important procedural improvements with respect to the COMI is to provide a framework for a comprehensive examination of the jurisdiction by the requested court. At present, the Regulation does not address this issue, which is dealt with by the procedural laws of the Member States and by the general principles of efficiency and of mutual trust among the Member States. However, national practices have shown that the jurisdiction under article 3 of the Regulation is assessed differently by domestic courts. Indeed, the External Evaluation pointed out that "in some Member States, the opening of insolvency proceedings is based on the information provided by the debtor, without any further factual inquiries of the court.

[169] See for an analysis of the classification "Corporate Financial Distress and Bankruptcy: A Survey", Lemma W. Senbet and Tracy Yue Wang, July 2012, *C.1 Debtor Friendliness versus Creditor Control*, pp. 20 ff.

In other Member States, the courts examine ex officio whether the factual requirements of article 3(1) EIR are met or appoint a provisional liquidator for the necessary inquiries. As a result, the duration of opening proceedings varies considerably in the Member States".[170]

267. The new article 3(b) of the Proposal requires a court, seized of a request to open insolvency proceedings, to examine, on its own initiative, where the debtor's COMI is actually located within its jurisdiction, and, if needed, require the debtor to submit additional evidence to support his assertions and (ii) give the debtor's creditors the opportunity to present their views[171], in order to specify in the opening decision its jurisdiction pursuant to article 3 of the Regulation.[172]

268. For proceedings opened without a court decision the European Commission proposes that the insolvency practitioner, if any is appointed, should have an obligation to examine the issue of jurisdiction. This specific issue has been considered because of the extension of the scope of the Regulation for the proceedings regarding the restructuring of a company at a pre-insolvency stage.[173]

269. The introduction of an *ex officio* examination by the opening court or body is not a new concept developed in European Union law. Indeed, Regu-

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[170] See the External Evaluation, p. 18. The External Evaluation also highlighted that "it does not seem to be clear for all courts that they are under an obligation to examine their jurisdiction ex officio and to expressly note the jurisdictional basis of their decision to open proceedings in the decision opening the proceedings", COM (2012) 743, final, p. 10.

[171] See New recital 12(a) of the Proposal.

[172] It must be noted that the External Evaluation advised providing for additional procedural rules in case the debtor relocated its COMI to another Member State on the eve of the insolvency proceedings. Accordingly "the debtor should be obliged to inform the Court as to whether it has relocated its residence within a period of six months before filing for insolvency proceedings and to indicate its main creditors. This information (which could be provided on a standard form) will enable the court to contact (informally) the main creditors prior to the opening of the insolvency proceedings".

[173] The Proposal extends the scope of the Regulation for the proceedings regarding the restructuring of a company at a pre-insolvency stage or proceedings which leave the existing management in place, which have recently been introduced in many Member States' insolvency legislation and which promote the rescue of an economically viable debtor. The dispossession criterion is amended in order to allow proceedings where the debtor remains in possession without a liquidator being appointed to benefit from the provisions of the Proposal. However, the Proposal does not include Pre-Insolvency confidential proceedings which by nature should not be published. See article 1 of the Proposal ("This regulation shall apply to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and which is for the purpose of rescue, adjustment of debt, reorganisation or liquidation").

lation No. 44/2001 already contains a provision obliging the court seized to examine jurisdiction on its own initiative in case the defendant does not put in an appearance.[174]

§ 2. Right of foreign creditors to challenge the opening decision

270. The Regulation has also been criticised due to the fact that many national proceedings do not allow creditors to state their own views and do not provide for effective means to challenge the opening decision. Taking into consideration the *Eurotunnel* case, heard by the French Supreme Court, the Proposal suggests that any creditor of an interested party, who has his habitual residence, domicile or registered office in another Member State should be able to challenge the decision opening the proceedings.[175] The court concerned would be obliged to prove that the provision in its national law in that regard has been observed.

271. The new article 3(b)3 also provides that "the court opening main proceedings or the liquidator shall inform such creditors insofar as they know of the decision in due time in order to enable them to challenge it". This last point, whose goal is to give to the debtor's creditors the opportunity to have an effective remedy against the opening decision, could give rise to practical and specific difficulties, particularly in connection with the length of the remedies as the period for bringing an action should only begin from the time that the information is received.[176] With respect to the publicity of insolvency proceedings, it must be noted that the Proposal requires Member States to keep a public and accessible electronic register in their territory that provides information regarding the opening of insolvency proceedings.[177] For its part,

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[174] See article 26 of 44/2001 Regulation which provides that "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not put in an appearance, the court shall declare on its own initiative that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation."

[175] See article 3(b)(3) of the Proposal, "Any creditor or interested party who has his habitual residence, domicile or registered office in a Member State other than the State of the opening proceedings, shall have the right to challenge the decision opening main proceedings. The court opening main proceedings or the liquidator shall inform such creditors insofar as they know of the decision in due time in order to enable them to challenge it."

[176] See P. Roussel Galle, "La proposition de révision du règlement No. 1346/2000 sur les procédures d'insolvabilité, entre prudence et audace", *op. cit.*

[177] See article 20(*bis*) of the Proposal which provides that the following information shall be available to the public: "(a) the date of the opening of insolvency proceedings, (b) the court opening insolvency proceedings and the case reference number, if any, (c) the type of insolvency proceedings opened, (d) the name and the address of the debtor, (e) the name and the address of the

the European Commission undertakes to establish a system for the interconnection of insolvency registers that will be accessed via the European e-Justice Portal.[178] Hopefully, with adequate rules of publicity the deadline for challenging the opening of the main proceedings will be reduced.

Sub-section 3
The Lack of institutionalised anti-abuse rule

§ 1. New specifications introduced in the Proposal

272. Regrettably, the Regulation does not include any express provisions to curtail the abuse of forum *shopping*. recital 4 of the Regulation only expresses the view that forum shopping should be avoided: "It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)."

273. Case law tried to overcome the lack of efficient provisions regulating COMI shifts on the basis of the general principle of abuse of law. In the *PIN group* case, the German Local Court decided that the COMI shift from Luxembourg to Cologne that occurred just one month before the filing of an application for the opening of insolvency proceedings was not abusive as it served the restructuring objective and hence was in the interest of the group's creditors.[179] However, to the best of our knowledge, until now, there has not been a CJEU judgment that specifically deals with the issue of a potential misuse of rights.[180]

274. The Proposal suggests adding at the end of recital 4 "to the detriment of the general body of creditors" but without providing for any criteria to distinguish between abusive COMI relocations or genuine COMI relocations. In any

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liquidator appointed in the proceedings, if any, (f) the time limit for lodging claims, (g) the decision opening insolvency proceedings, (h) the decision appointing the liquidator, if different from the decision referred to point (g) of this paragraph, (i) the date of the closing main proceedings".

178 See article 20(*ter*) of the Proposal.

179 H. Eidenmüller, "Abuse of Law in the Context of European Insolvency Law", *op. cit.*, p. 14. See, about this decision, paragraphs 147 and following of the first part of this article.

180 The issue of abusive COMI shift was raised by the CJEU's Advocate General Kokott in its opinion delivered on 10 March 2011 in the *Interedil* case. Specifically, the issue was to determine if a COMI shift by the debtor prior to the application for insolvency proceedings could be challenged. The CJEU did not provide a solution because the referring court did not formulate a question on this topic and it was not possible to "infer sufficient grounds to suggest misuse of rights from the facts of the case which have been outlined", see §72 of the opinion of the CJEU's Advocate General Kokott.

case, it would be very difficult to ascertain whether a COMI shift is abusive or not due to the large degree of uncertainty that involved a fraud-based test.[181] Eventually, COMI shifts that are only motivated by a more attractive regulatory environment could not be successfully challenged because of the legitimate exercise of the freedom of establishment.

275. Indeed, in many cases the relocation to benefit from a different applicable regime and law may be suitable for some creditors and stakeholders and detrimental to others, whereas under the current regime those creditors who suffer from the COMI relocation have no control over it.[182] However, in some exceptional circumstances, a COMI shifts might be considered as an abuse of freedom of establishment, especially when it implies a fictitious transfer of registered office or of activities aimed at escaping the provisions on national insolvency national law,[183] liability in the State of origin, or to remove available assets from creditors.

276. The inclusion of the terms "the detriment of the general body of creditors" could potentially have given rise to a large body of domestic court case law due to the difficulty of interpretation of this requirement. In particular, the most plausible questions to be raised are whether as a matter of law:

(i) the courts will place the threshold regarding the "percentage" of creditors concerned;
(ii) the courts will only hear privileged creditors who have a chance to recover something;
(iii) the courts will pay more attention to the assets that could be realised; should the amount cover only senior creditors, whether the courts will investigate further;
(iv) the courts will only refer to the majority of creditors during pre-insolvency measures, adopted to save the debtor's activity, such as a rescue plan adopted by a majority of creditors.

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[181] See for a criterion proposal to determine an abusive COMI shift, H. Eidenmüller, "Abuse of Law in the Context of European Insolvency Law", *op. cit.*, p. 13. This author explains that a COMI shift surely cannot be considered abusive "whether the COMI shift contributes to maximise the net assets available to satisfy creditors' claims". He adds that "COMI shifts that evidently benefit either the debtor at the expense of its creditors or some creditors at the expense of others are suspicious. Such COMI shifts are driven by distributive considerations and not by the goal of maximising the net assets available to satisfy creditors' claim. If a COMI shift is evidently carried out to enrich the person(s) initiating it at the expense of other stakeholders, the shift is abusive".

[182] See "Revision of the European Insolvency Regulation. Proposals by INSOL Europe", p. 43.

[183] See for an example of COMI shift considered by courts as abusive, Federal Court of Justice ("Bundesgerichtshof"), Resolution of 13 December 2007, *op. cit.*

277. A more drastic approach was taken in the INSOL Proposal with the intention of achieving a higher level of creditor protection. The approach consists of establishing a rule that provides that a former COMI remains decisive if the insolvency petition is filed shortly after a COMI shift. Specifically, INSOL Europe is of the opinion that a provision should be included in the Regulation establishing a claw-back period of one year during which the jurisdiction stays with the Member State of the previous COMI, if the debtor has left unpaid liabilities caused at the time its COMI was located in that country, unless all creditors of the said liabilities have agreed to the transfer of the COMI in the other Member State.[184] This solution would have the advantage of protecting creditors' rights during the claw-back period, although a harmonisation at European level of some other key elements of national insolvency laws would certainly be more effective.

§ 2. Further steps to harmonise key elements in various European insolvency regimes

278. Another approach would be to proceed with harmonisation of European insolvency regimes. The European Commission highlighted this necessity in order to promote a business-friendly environment in accordance with the Small Business Act of 2008.[185] This is a further step that could be achieved in 2020. In this respect, the European Parliament recommended harmonising some specific aspects of national insolvency law and company law:[186]

279. Firstly, in 2010, the European Parliament clearly identified the following areas:

(i) "the rules on the of opening of insolvency proceedings including the eligibility of the debtor;
(ii) the rules on the filing and verification of claims;
(iii) the rules on the responsibility for the proposal, verification, adoption, modification and contents of reorganisation plans;
(iv) the rules on the voidness, voidability and unenforceability of detrimental acts;

[184] See INSOL Proposal, p. 42.

[185] COM (2012) 742 final.

[186] See European Parliament, "Harmonisation of insolvency law at EU level", 2010, PE 419.633. This was followed by the study "harmonisation of insolvency law at EU level with respect to opening of proceedings, claims filing and verification and reorganisation plans", EP 2011, PE 432.766. See also, A. d'Hautefeuille's report, "Consultation sur la révision du règlement européen sur l'insolvabilité des entreprises », *CCIP*, 7 June 2012.

(v) the rules on the termination of contracts and rules on the mandatory performance under contracts; and
(vi) the rules on the liabilities of directors, shadow directors, shareholders, lenders and other parties involved with the debtor".

280. Secondly, in 2011 the European Parliament focused on the above-mentioned aspects:

– "opening of insolvency proceedings (especially criteria for the opening like standard bankruptcy test, entities entitle to file petition, standardization of a compulsory time frame to file);
– claims filing and verification;
– reorganisation plans".

Section 3

Creation of a codified framework for the insolvency of members of a group of companies

281. The location of a debtor's COMI during the insolvency of a group of companies is one of the most controversial issues as the Regulation does not contain specific provisions that deal with the insolvency of a group of companies. Discussions have mainly concerned the case of a financially distressed group of companies, in which the parent company was located in a Member State and a subsidiary had its registered office in another Member State, where it appeared that the effective management power of the subsidiary was located at the head office of the parent company.

282. The European Commission's approach does not achieve "substantive consolidation", entailing the consequence that "all the companies of the group be 'thrown' together into one estate and the assets as well as the liabilities be compounded"[187] but maintains the strict entity approach which underlies the Regulation (see below, Sub-section 1). Nevertheless, the Proposal takes a step forward by providing new rules extending the co-operation and communication between insolvency practitioners and courts, if insolvency proceedings are opened by several courts in different Member States (see below, Sub-section 2).

[187] See INSOL Proposal, p. 91, §V.2.

Sub-section 1

Preference for a strict entity approach for a group of companies

283. At present, the Regulation does not provide for a group COMI approach. In accordance with the provisions of the Regulation, the COMI should be determined for each company of the group and the court of the Member State where it is located shall have jurisdiction to open main insolvency proceedings.[188] The courts of other Member States have an obligation to recognise the opening proceedings when it becomes effective in the opening Member State.[189] Once opened, the main proceedings prevents the opening of competing proceedings for the same debtor in other Member States.[190] Pursuant to the priority rule provided by article 3(2) of the Regulation, only secondary territorial proceedings can be opened in other Member States against the debtor if he holds an establishment in that Member State.

284. Nevertheless, as previously mentioned practitioners and domestics courts have addressed the lack of provisions dealing with groups of companies by trying to concentrate solely under the jurisdiction of one court all the proceedings opened to the benefit of several companies belonging to a group by means of a wide interpretation of the COMI concept.[191] However,

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188 Article 3(1) of the Regulation.

189 Article 16 of the Regulation.

190 Article 22 of the Regulation.

191 Several domestic courts thus considered that the debtor's COMI of one member of a group of companies is not located at the place of its registered office but before the court of the parent company's registered office. As a consequence, the court of the Member State where the Parent company is located had jurisdiction to open main insolvency proceedings against each subsidiary of the group. These decisions are generally based on several criteria to justify such a consolidation of insolvency proceedings, such as the place where the major decisions are taken. However, this applies to "holding companies". In any case operational companies cannot have their COMI situated in another place than the one of the country where their factories are located and the operational decisions are taken (as mentioned in the report accompanying of the Proposal, "the courts concerned generally justified such a consolidation of insolvency proceedings on the grounds that the subsidiaries' commercial decisions were controlled by the parent company", see COM [2012] 743, final, p. 15). See for some examples paragraphs 33 and following of the first part of this article. The CJEU reduced the scope of this approach, quoting in its *Eurofood* decision that the COMI of each legal entity has to be established separately, each debtor constituting a separate legal entity being subject to its own jurisdiction. Consequently, the opening of one unitary insolvency procedure over a group of companies is excluded. However, it is still possible to open insolvency proceedings over a subsidiary in the Member State where the parent company has its registered office, only if objective and ascertainable factors establish that the subsidiary's COMI is located at the seat of the parent company. This will be the case if the decisions regarding the financing of the subsidiary are taken by the parent company and if the latter controlled the operational business and the hiring of employees (See *Eurofood, op. cit.*, §30. According to the CJEU,

this approach has only been applied in the case of highly integrated groups of companies. As a consequence, practitioners, liquidators and courts have developed different means, such as conclusion of protocols or cooperation agreements, for a non-highly integrated group or companies.[192]

285. The Proposal does not provide for overhauling the applicable rules to a group of companies. The European Commission's approach is to consider that each company shall continue to benefit from autonomous proceedings opened where its COMI is located. However, the new recital 20b specifies that the possibility for a court to open insolvency proceedings for several companies belonging to the same group, particularly in the case of highly integrated groups of companies, shall be feasible, if the court finds that the COMI of these companies is located in a single Member State. The Proposal also encourages the courts to appoint the same liquidator for these proceedings.[193]

286. Consequently, in the case of non-highly integrated groups of companies, the courts of different Member States where each member of the group has its COMI shall open insolvency proceedings. In that situation the Proposal suggests adding a new specific chapter (IV*bis*) "Insolvency of members of a group of companies", in relation to the cooperation between liquidators, between courts, or between courts and liquidators.[194]

287. Finally, it is noteworthy, that the Proposal does not assimilate subsidiaries to the concept of establishment as defined in article 2h of the Regulation. Therefore, the Proposal does not sanction the idea that main proceedings should be opened for a group with secondary proceedings for subsidiaries. This solution would also preserve the national rights of creditors with an overview by the main liquidator and the possibility to have a single rescue plan or liquidation plan for all the members of the group. Nevertheless, the new rules

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the sole control of corporate direction is not sufficient to locate the COMI of a subsidiary with its parent company, rather than at its own address [see about this decision paragraphs 40 and following of the first part of this article]. See also *Rastelli, op. cit.,* §25).

192 See R. Dammann, V. Bleicher, "Le droit communautaire des entreprises en difficulté : état des lieux", *op. cit.*, p. 43.

193 See recital 20(b), "the introduction of rules on the insolvency of groups of companies should not limit the possibility of a court opening insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of these companies is located in a single Member State. In such situations, the court should also be able to appoint if appropriate, the same liquidator in all proceedings concerned".

194 See M. Menjucq, "La proposition de règlement modifiant le règlement (CE) No. 1346/2000 sur les procédures d'insolvabilité : une évolution mais pas une revolution", *op. cit.*, p. 5.

provided by the Proposal on cooperation and coordination between practitioners and courts, is under way to address this issue.

Sub-section 2

Rules on cooperation and coordination between practitioners and courts : innovation of the proposal

288. The Proposal adds a chapter on insolvency of a group of companies. In view of this new chapter, the definitions of "group of companies"[195], "parent company", "subsidiary", "ultimate parent company" and "group main proceedings" are included in article 2. As mentioned above, it also introduces procedural tools to coordinate insolvency proceedings dealing with the different members of the same group of companies if insolvency proceedings are opened by several courts in different Member States.

289. Firstly, the Proposal requires the liquidators and the courts involved to cooperate with each other in a way that is similar to the cooperation and communication that should take place between main and secondary proceedings.[196] In accordance with article 42(a) of the Proposal, the liquidators should notably exchange information which may be relevant to other proceedings and cooperate in the elaboration of a rescue or reorganisation plan where appropriate. The European Commission sets forth the possibility to cooperate by way of conclusion of protocols and cooperation agreements. Courts should cooperate, in particular, by exchanging information, coordinating the administration and supervision of the assets and affairs of the members of the group, as well as coordinating the conduct of the hearings and approving protocols brought before them by the liquidators.[197]

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[195] See article 2(i) of the Proposal, which defines the group as "number of companies consisting of parent and subsidiary companies. In accordance with article 2(j) of the Proposal, parent company means a company which (i) has a majority of the shareholders' or members' voting rights in another company (a 'subsidiary company'), or (ii) is a shareholder or member of the subsidiary company and has the right to (aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary, or (bb) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association".

[196] See COM (2012) 744 final, p. 10.

[197] See article 42(b) of the Proposal. Concerning the cooperation and communication between liquidators and courts see article 42(c) of the Proposal which provides that "a liquidator appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request for the opening of proceedings with respect to another member of the same group of companies is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the coordination of the procee-

290. Secondly, the Proposal gives mutual standing to liquidators in proceedings concerning a group of companies. Specifically, the liquidator has a right to (i) be heard in the proceedings of each member of the group, (ii) request a stay of the other proceedings, (iii) propose a reorganisation plan in a way which would enable the respective creditor's committee or court to take a decision on it, and (iv) attend meetings of creditors in other proceedings.[198]

291. All these measures are welcomed as they would facilitate the tasks of insolvency practitioners. Similarly, a reflection on the professionalisation of insolvency practitioners should be conducted by the European Commission.

Conclusion

292. The Proposal has clarified the COMI concept, to reflect CJEU case law, with respect to the opening of main insolvency proceedings. In this respect no specific innovation has been implemented compared to the CJEU recent judgments, especially *Interedil* case.

293. The Proposal has also tackled the forum shopping issue by introducing a specific requirement in recital 4 ("not to be detrimental to the general body of creditors"). As this is a general guideline and definitely not an "official user's guide", room for interpretation is left to the domestic courts. This new requirement is supplemented by a welcome *ex officio* examination of the COMI place by court or insolvency practitioners and a widening of the rights of foreign creditors to challenge the opening decision.

294. As for groups of companies, the Proposal should be considered as an evolution rather than a revolution (as expected by certain practitioners). For specific cases it allows the opening of insolvency proceedings for several companies belonging to a fully integrated group in a single jurisdiction if the court establishes that the COMI of these companies is located in that Member State, and to appoint the same liquidator in all proceedings concerned.

295. Finally, the most innovative aspect is in the European Commission's willingness to organise wide and full cooperation between courts and practitioners and establish a system for the interconnection of insolvency registers

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dings and is not incompatible with the rules applicable to them. In particular, the liquidator may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed".

198 Article 42(d) of the Proposal.

which will be accessed via the European e-Justice Portal. However, on a sad note, without attempting to regulate the profession of insolvency practitioners at EU level, this will be difficult to achieve.

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