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# The Place of the Registered Office of a Company: a Cornerstone in the Application of the EC Insolvency Regulation

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## 1. Introduction

Pursuant to Article 3(1) of the EC Insolvency Regulation, the international jurisdiction of a court to open main insolvency proceedings regarding a debtor is linked to the definition of (the debtor's) "centre of main interest."<sup>1</sup> The second sentence of Article 3(1) reads: "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary." In this article I will analyse certain elements of "centre of main interest," including the way said presumption should be understood. I therefore also will comment on the effect of the presumption as explained in the recent judgment of the European Court of Justice of 2 May 2006 (Case C-341/04) concerning *Eurofood IFSC Ltd.*, the Irish finance vehicle of *Parmalat SpA*.

## 2. Centre of main interests

Main insolvency proceedings encompass all the debtor's assets, consequently they are considered to have universal effect within the Community (except for Denmark). The proceedings affect all assets and all creditors, wherever located in the world despite true and full universal scope being dependent on the acceptance of universality by non-EU Member States. The liquidator appointed may in principle exercise his powers in all Member States and the law applicable to the main proceeding in principle

is the law of the Member State within the territory of which these main proceedings have been opened. The opening judgment must be recognised by other Member States (Article 16). This all stresses the importance of the decision to open main insolvency proceedings and the international jurisdictional authority to do so based on the existence of a "centre of main interest" of the debtor. The term centre of main interest aims to reflect "the focal point of the economic life of the debtor", and presupposes a degree of "institutionalised presence" in this forum.<sup>2</sup> "The phrase 'centre of the debtor's main interests' has been unattractively, but conveniently, reduced to the acronym COMI," according to an English judge.<sup>3</sup> The Regulation does not define COMI despite a definition for COMI having been submitted to the European Parliament.<sup>4</sup> The only indication of what COMI is presumed to mean is to be found in Recital 13 to the Insolvency Regulation, which states: "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."<sup>5</sup> The present text of Recital 13 clearly flows from the unofficial explanatory Report to the text, known as the Virgós/Schmit Report (1996), No. 75, which provides some guidance stating that "centre of main interests" must be interpreted "as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". This wording carries a "law and economics" dimension, in that the reporters argue "insolvency is

1 Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings entered into force on 31 May 2002. The Regulation applied entirely and directly to the ten Member States, which joined the EU as of 1 May 2004. Some smaller changes to the Regulation and the Annexes, based on Article 20 of the Act of Accession (O.J. L 236 of 23 September 2003), have led to a consolidated version of the Insolvency Regulation, see [http://europa.eu.int/eur-lex/en/consleg/reg/en\\_register\\_1920.html](http://europa.eu.int/eur-lex/en/consleg/reg/en_register_1920.html). The Annexes have been amended again by Council Regulation (EC) No. 603/2005, see O.J. L 100/1 of 20 April 2005 and by Council Regulation (EC) No. 694/2006, see O.J. L 121/1 of 6 May 2006. For a general overview, see Wessels, *The EC Insolvency Regulation: Three Years in Force*, in: *European Company Law*, June 2005, Issue 2, 50ff.

2 Virgós/Garcimartín, *The EC Regulation on Insolvency Proceedings: A Practical Commentary*, Kluwer Law International 2004, No. 46.

3 See Judge Langan, in: *High Court of Justice Chancery Division Leeds 20 May 2004 (C4Net.Com Inc.)*, ZIP 2004, 1769.

4 See Committee on Law and Internal Market, 23 February 2000, A5-0039/2000: "Der Ort, von dem aus der Schuldner hauptsächlich Geschäftsbeziehungen unterhält sowie andere wirtschaftliche Tätigkeiten ausübt und zu dem er deshalb die engsten Beziehungen unterhält" – which can be translated as – the place, from which the debtor mainly entertains economic relations as well as exercises other economic activities and to which place he therefore maintains the closest relationships.

5 For a historic background, see Kübler, *Der Mittelpunkt der hauptsächlichen Interessen nach Art. 3 Abs. 1 EuInsVO*, in: Schilken *et al.* (eds.), *Festschrift für Walter Gerhardt*, RWS Verlag Kommunikationsforum 2004, 527.

a foreseeable risk. It is therefore important that international jurisdiction (which ... entails the application of the insolvency laws of that ... State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."<sup>6</sup>

### 3. Ascertainability by third parties

Where Recital 13 juxtaposes the word "and" ("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") with "the place" etc. The "ascertainability" by third parties is a second (cumulative) condition being the way in which the debtor manifests himself on a regular basis "towards the outside world (i.e. in the market)."<sup>7</sup> Decisive is the (potential) creditor's relation to a single debtor company, not to a group of companies to which the debtor is an entity. It is a common proposition that "third parties" are (potential) creditors. However, from case law it can be seen that distinctions are made. In the case of High Court of Justice Leeds 16 May 2003 (*Daisytek*),<sup>8</sup> the court was satisfied from the evidence that Bradford (UK) was the place from which three German companies and one French company conducted the administration of their interests on a regular basis. In the court's view the identification of "the debtor's main interests" requires the court to consider "both the scale of the interests administered at a particular place and their importance and then consider the scale and importance of its interests administered at any other place which may be regarded as its centre of main interests, whether as a result of the presumption in Article 3(1) or otherwise." In addition the court considered that the requirement in Recital 13 that, as a result of the administration of its interests at a particular place, the fact that such place is the centre of the debtor's main interests must therefore be "ascertainable by third parties" was "very important." In the view of the court in the case decided the most important "third parties" referred to in Recital 13 are "the potential creditors." The High Court in Leeds went on to concentrate on a certain category of creditors: "In the case of a trading company the most important groups of potential creditors are likely to be its financiers and its trade suppliers." The evidence in this case was that the financing of the German companies' business by a factoring agreement

was organised for them by the company in Bradford (UK) and that 70 per cent of the goods supplied to the German companies were supplied under contracts made by that company. The court: "It appears that a large majority of potential creditors by value (which I regard as the relevant criterion) know that Bradford is where many important functions of the German companies are carried out. It is clear that the functions carried out in Bradford are important and that the scale of those functions is very significant. By comparison the local functions of the German companies in Germany are limited. They require approval from Bradford to buy anything costing more than 5,000 euros. Only 30% of stock purchases are negotiated locally. These activities are the most relevant because they involve dealings with potential creditors. 85% of sales are negotiated by the German companies but those activities carry less weight as customers are normally debtors rather than creditors." The court was therefore satisfied that Bradford was the centre of main interests for each of the three German companies.<sup>9</sup> Similarly, a year later, the High Court of Justice, Chancery Division Leeds 20 May 2004 (*Ci4Net.Com Inc.*), deciding that "the most important third parties referred to in Recital 13 are the potential creditors. In case of a trading company the most important group of potential creditors are likely to be its financiers and its trade suppliers."<sup>10</sup> In both cases the court used a subjective test for certain groups of creditors. The Virgós/Schmit Report (1996), No. 75, however, uses as a criterion "a place known to the debtor's potential creditors," which indicates that an objective test should be applied for the place where the debtor (objectively) is ascertainable for (all) creditors.<sup>11</sup>

### 4. The presumption

The Insolvency Regulation presumes that in the absence of proof to the contrary the place of the registered office of a company is the centre of main interests.<sup>12</sup> The rationale for the presumption is that such a location commonly corresponds to the company head office. The Virgós/Schmit Report (1996), No. 75, is very brief on this important topic: "Where companies and legal persons are concerned, the [Regulation] presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office." Although in many cases this pre-

6 The words cited in Recital 13 are considered by Virgós/Garcimartín, *op. cit.*, no. 48, to provide an equally valuable definition to the definitions provided in Article 2 of the Regulation, alleging that "should correspond" is an equivalent but stylistic form of "shall be."

7 See Virgós/Garcimartín, *op. cit.*, no. 52.

8 High Court of Justice Leeds 16 May 2003, [2003] B.C.C. 562; [2003] All E.R. (D) 312 (Jul); JOR 2003/287; NZI 2004, 219; ZIP 2004, 963. See: Wessels, Current Topics of International Insolvency Law, Deventer: Kluwer 2004, 155.

9 With a similar reasoning for the French company.

10 High Court of Justice, Chancery Division Leeds 20 May 2004 (*Ci4Net.Com Inc.*), ZIP 2004, 1769.

11 In this way too Kebekus, *Grenzüberschreitende Insolvenzen – Neue Herausforderung an die Insolvenzpraxis*, in: Andreas Konecny (ed.), Insolvenz-Forum 2004. Vorträge anlässlich des 11. Insolvenz-Forums Grundslee im November 2004, Neuer Wissenschaftlicher Verlag, Wien Graz, 2005, 85ff.

12 Certain information and evidence must be available for the application of Article 3(1). This also is the case with regard to the question which party has to prove what to indeed have the presumption rebutted. For an analysis of these questions, see my forthcoming book: Wessels, International Insolvency Law, Kluwer, 2006, para. 10555ff.

sumption may be correct, the situation can vary enormously in practice. In some countries, for example the UK, it is quite common for the registered office to be situated other than in the location of the operational headquarters of the company. Duursma-Kepplinger<sup>13</sup> criticises the choice for this presumption in the light of Recital 13, as in the description of the COMI, the connecting factor is the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties. The presumption, as I understand the author, deviates from the rationale of the recital. Virgós and Garcimartín<sup>14</sup> though submit that it is not so much the substantive element of the presumption that is decisive, but more the presumption's function as a rule for the burden of proof and for resolving doubts.

The Insolvency Regulation does not indicate which party bears the burden of proof or what such proof should consist of in order to successfully rebut the presumption. The effect of the aforementioned presumption can be described in two ways:

- (i) the presumption is a strong one; deviation from the presumption may only occur under very specific circumstances, e.g. with obvious sham companies;
- (ii) the presumption is only a factual matter and has the same weight as any other determinative fact.

Sub (i). It has been stated in legal literature that the presumption is a strong one; deviation may only occur under very specific circumstances, e.g. in the case of obvious sham companies.<sup>15</sup> The court must be fully convinced that a place other than the registered office is the COMI of the debtor.<sup>16</sup> It is clear from several judgments that the weighing of the facts is a balancing act. Where a company appears to have merely a registration in another Member State, and the registered office is considered to be fictive, the suggestion, in literature, of possible deviation in relation to sham companies seems to be followed and several courts have rebutted the presumption quite easily, *see for instance* Commercial Court Brussels 8 December 2003.<sup>17</sup> The company EUROGYP, the court decided: "was untraceable at the address of its '*siège social français*' (*see* the declaration of the bailiff) and was therefore not subject to French law for the purpose of acquiring recognition as a legal entity; the fact that it continued – in the absence of any evidence to the contrary – to

declare taxation in advance ('*précompte professionnel*' / '*bedrijfsvoorheffing*'), to be registered as an enterprise ('*isolation thermique et acoustique*') and to maintain its VAT number (*tax a la valeur ajoutée*) gives rise to the conclusion that EUROGYP had never actually transferred its COMI despite creating that appearance by publishing the transfer of its legal seat." Therefore, EUROGYP continued to be situated in Brussels. The presumption was reversed and the court opened main insolvency proceedings. In a similar vain Court London (Rimer J) 17 January 2005,<sup>18</sup> which stated that the location of offices and the entire administration in London, which was known to and ascertainable by creditors and other third parties, determined that a COMI was in the UK. The only connection with Northern Ireland was a formal registration there, and was therefore rebutted. In other cases, where the facts are less evident, the role of the presumption should be considered in terms of its basic function as explained by Virgós and Garcimartín. The function of the presumption is to serve as a rule for the burden of proof (if the presumption is accepted as valid; the burden of proof rests on the party that wishes to rebut it) and to serve as a rule to assist in the resolution for resolving doubts: where there is evidence supporting both arguments – in connection with Member State A or Member State B – the presumption prevails.

Sub (ii). In High Court of Justice Chancery Division Leeds 20 May 2004 (*Ci4Net.Com Inc.*)<sup>19</sup> the court considered the facts for deciding upon the location of the COMI. The court referred to the *Daisytek* judgment mentioned above, Recital 13 and the Virgós/Schmit Report, No. 75 (cited above). It added that the presumption that a company has its COMI at the place of its registered office "is not particularly strong." According to the court the location of the registered office was merely one of several factors to be considered within the whole body of evidence for reaching a conclusion as to the location of a company's COMI. Other courts hold the same view, *see e.g.* High Court (Leeds District Registry) 9 February 2005 (*Parkside Flexible S.A.*)<sup>20</sup> and High Court of Justice Chancery Division Birmingham 18 April 2005 (*MG Rover I*)<sup>21</sup> in which case the court considered that the decision regarding the location of a debtor's COMI requires a balancing exercise and a qualitative assessment to be carried out. The court referred to *Parkside Flexible S.A.* in which

13 Duursma-Kepplinger, H.-C./Duursma, D./Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, Art. 13, no. 23.

14 Virgós/Garcimartín, *op. cit.*, no. 57ff.

15 *See e.g.* Sagaert, *Internationale faillissements*, in: Cousy/Dirix (eds.), Cahier/Themis, vormingsonderdeel 20, academiejaar 2003-2004, Brugge, Die Keure, 2003, nr. 24. Van Wieringen Borski/Ouweland, *De Europese Insolventieverordening onderweg naar Luxemburg*, Tijdschrift voor Insolventierecht 2004/6, 309; Marquette/Barbé, Council Regulation (EC) No. 1346/2000. Insolvency Proceedings in Europe and Third Countries. Status and Prospects, in: A. Nuyts & N. Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Bruylant, Bruxelles, 2005, 419.

16 *See* Prütting, *Die Europäische Insolvenzordnung und das grenzüberschreitende Insolvenzverfahren*, in: Andreas Konecny (ed.), *Insolvenz-Forum 2004*. Vorträge anlässlich des 11. Insolvenz-Forums Grundslee im November 2004, Neuer Wissenschaftlicher Verlag, Wien Graz, 2005, 157ff.

17 Commercial Court Brussels 8 December 2003, *Droit des Affaires/Ondernemingsrecht* 2003, 96, nt. B. de Moor.

18 Court London (Rimer J) 17 January 2005 (*3T Telecom Ltd.*), described by Moss, *Insolvency Intelligence*, February 2005.

19 High Court of Justice Chancery Division Leeds 20 May 2004 (*Ci4Net.Com Inc.*), ZIP 2004, 1769.

20 High Court (Leeds District Registry) 9 February 2005 (unreported) (*Parkside Flexibles S.A.*).

21 High Court of Justice Chancery Division Birmingham 18 April 2005 (*MG Rover I*), NZI 2005, 467, comments by Penzlin/Riedemann; ZIP 2005, 1610; EWIR 2005, 637, comments by Mankowski.

the judge described the decision as fact sensitive and stated that a presumption would rarely be determinative: "It is possible in this case to make a decision on the facts, one of the factors influencing which is the presumption provided for in the Regulation."<sup>22</sup> I disagree, as the presumption reflects a certain legal norm, and not merely a factual element. Viewing these cases, it is therefore uncertain as to how a court will interpret the presumption. This situation is not in the best interests of creditors who generally require certainty prior to entering into a transaction. Finally, the approach is contrary to the Regulation's general objective of providing for efficient and effective administration of cross-border insolvency cases.

In the aforementioned case of High Court (Leeds District Registry) 9 February 2005 (*Parkside Flexibles S.A.*), the company – Parkside Flexibles S.A. – was registered in Poland and was a wholly owned subsidiary of Parkside International Ltd. ("PIL"), an English company. Parkside produced and sold packaging materials, employing some 150 people. PIL and three other companies in the group were subject to English insolvency proceedings. Having considered several factors in favour of both England and Poland as the COMI, the court determined by "the narrowest of margins" that on balance of the evidence England was the location of the COMI. A key factor was the creditor's standpoint: "It is the need for third parties to establish the centre of the debtor's main interest that is paramount, because, if there are insolvency proceedings, the creditors need to know where to go to contact the debtor". It is submitted that the concept of "where to go to contact the debtor" is not the equivalent of Recital 13's point of departure that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. Furthermore, it was unclear in the court's decision that, ultimately, the presumption would prevail if all factual connections did not provide a reasonably clear result.<sup>23</sup>

##### 5. Basis for the COMI decision

Judicial decisions on COMI are fact-related. This prompts further questions in relation to which particular facts are to be considered. Are all facts relevant, including historical facts or only the facts as they exist on the day of the court decision

regarding international jurisdiction to open main proceedings? The first approach can be categorised as the "all facts" approach and the second as the "snap shot" theory.<sup>24</sup> Furthermore, on which date should the presence of a COMI of the debtor be determined? Broadly speaking, three reference dates in time could be suggested: (i) the date that the petition is presented (i.e. the date the application for opening insolvency proceedings is filed), (ii) the date of the court's first judgment, e.g. commencing provisional insolvency proceedings and/or appointing a provisional liquidator, or (iii) the date of the final and definitive opening of these proceedings. The latter question was considered by the European Court of Justice in its judgment of 17 January 2006 (*Susanne Staubitz-Schreiber*).<sup>25</sup> The ECJ ruled that Article 3(1) must be interpreted as meaning that the court of the Member State, within the territory of which the COMI is situated at the time when the debtor lodges the request to open insolvency proceedings, retains jurisdiction to open those proceedings if the debtor moves its COMI to the territory of another Member State after lodging the request but before the proceedings are opened. The method of interpretation again highlights the significance of the recitals. Furthermore it is striking that in this decision all the recitals are also viewed in the light of protection for the creditors' position. The ECJ's conclusion of "non-variation" of the jurisdiction once it has been established is reflected in the *perpetuatio fori* principle.<sup>26</sup> The decision affirms that the date on which the petition is presented (the date of filing) (sub (i)) is decisive for establishing international jurisdiction and not any later points in time (sub (ii) or sub (iii)). This serves to protect creditors, as it minimises possibilities of forum shopping.

##### 6. COMI for groups of companies: head office functions versus contact with creditors

The Insolvency Regulation does not contain specific rules concerning multinational groups of companies. If insolvency proceedings are opened against a company that is in some way related to another company the former company is considered to be a separate debtor in accordance with the rule that every legal person is a single debtor under the application of the Regulation. Moss and Smith<sup>27</sup> interpret the quoted words in the Virgós/

22 For a concurring view see: Tett/Spence, COMI: Presumption, What Presumption?, in: 17 *Insolvency Intelligence* 2004, 139; Videon/McCabe, Report from the UK, in: *European Company Law*, June 2005, Issue 2, 81.

23 It may be the case that the registered office of a company is located outside the EU, but that the company carries out all or a large part of its business in Europe. The question will therefore arise as to whether such a company has its centre of main interests in the Community (and main insolvency proceedings can be opened) and whether the Regulation applies. The prevailing view is that the Insolvency Regulation applies. See: Wessels, *op. cit.* (footnote 1), para. 10571 *et seq.*

24 The "facts" question is not discussed below.

25 See European Court of Justice 17 January 2006 (*Susanne Staubitz-Schreiber*), JOR 2006/59, comments by Wessels; ZIP 2006, 189, comments by Knof and Mock; NZI 3/2006, 153, comments by Mankowski; EWiR 2006, 141, comments by Vogl.

26 This rule that is well-established in the Netherlands "because another point of view would lead in practice to unworkable results and would be against the principle of legal certainty", see Netherlands Supreme Court 19 March 2004, NJ 2004, 295.

27 Moss/Smith, in: Moss *et al.* (2002): Moss/Fletcher/Isaacs (eds.), *The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide*, Oxford University Press, 2002, 8.39.

Schmit Report, No. 75 (“that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”) to mean that any evidence designed to show that the COMI is in a Member State other than that in which the registered office is located, must demonstrate that the head office functions were carried out in that other state. I question the validity of this interpretation, as the quoted words – as demonstrated above – only explain the logic of the choice for the presumption. They do, in my opinion, not present an independent criterion for determining COMI. Moss and Smith go on to suggest that it is more appropriate to focus on where the head office functions are carried out rather than on the location of the head office. Below I will submit that the authors with this submission leave the context of the COMI, being Recital 13: COMI as connecting factor is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. Despite no definition having been provided for “head office functions” the authors seem to suggest the place in which “head office functions” are carried out will be the place where activities such as strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc., are performed. It is my opinion that this approach is reflected in the first part of the recital (conducting administration of interests on a regular basis), however the condition in the recital that the debtor conducts this administration is not accounted for. This anomaly may be overcome (the debtor – based on internal control mechanisms – necessarily has these activities performed by the “head office”), however, there remains a shortfall in the approach in that it does not take into account the second part of the recital’s definition (“and is therefore ascertainable by third parties”). Third party creditors as “outsiders” of the debtor-company generally do not have sufficient insight into most of the aforementioned head office functions.

In several court cases (in the UK, Italy, Germany, Hungary and recently France)<sup>28</sup> the “head office functions” approach to determine COMI has been followed. In addition to the aforementioned judgement of High Court Leeds 16 May 2003 (*Daisytek*) I just mention two examples:

- Court Munich 4 May 2004 (*Hettlage*);<sup>29</sup> In this case, the debtor, *Hettlage AG & Co KG*, was a company registered in Austria and was a 100 per cent subsidiary of *Hettlage KGA*, registered in Germany. The court held: (i) the German court of the registered office of the parent company had international jurisdiction to open main insolvency proceedings against subsidiaries abroad, if the actual location of economic interests (“*tatsächliche Verwaltungsort der Wirtschaftlichen*

*interessen*”) and therefore the centre of the debtor’s main interests in the meaning of Article 3(1) was at the registered office of the parent company, (ii) the centre of main interests of a subsidiary abroad would be presumed to be the place of the inland company if the latter delivered services such as purchasing, sales, marketing, personnel and accounting as part of the operational business, (iii) by concentrating these tasks at the place of the registered office of the parent company (“*Konzernsitz*”, in Munich, Germany) the presumption of Article 3(1), second sentence, that the registered office of a company shall be presumed to be the centre of main interests in the absence of proof to the contrary (Innsbruck, Austria) was rebutted;

- High Court of Justice (Chancery Division Companies Court) 15 July 2005 (*Collins & Aikman Europe SA*).<sup>30</sup> The application for administration orders in the UK related to 24 companies in the Collins & Aikman Corporation Group, of which one was incorporated in Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden, three in Italy, one in Belgium, four in the Netherlands and one in the Czech Republic. The Collins & Aikman Group had its headquarters in Michigan, USA, and was a leading global supplier of automotive component systems and modules to the world’s largest vehicle manufacturers, including Daimler, Ford, General Motors, Honda, Nissan, Porsche, Renault, Toyota and Volkswagen. It had a combined workforce of approximately 23,000 employees and a network of more than 100 technical centres, sales offices and manufacturing sites in seventeen countries throughout the world. In Europe it operated 24 facilities in ten countries with 4,500 staff. Its largest customers were Daimler, Daimler Chrysler, General Motors and Ford but Ford accounted for approximately 60 per cent of the business of the European operations. The Group had in recent years grown considerably, primarily from acquisitions; but was in financial difficulty by virtue of its liquidity position. Consequently the US operations of the Group went into Chapter 11 proceedings in the United States in May 2005. The High Court considered Recital 13 and several English court decisions on the centre of main interests, including the Daisytek decision. Then the court referred to the Virgós/Schmit Report, according to the court, interpreting the centre of main interests as (para.75) “the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties.” The court then referred to literature, stating “that according to Dicey & Morris, Conflict of Laws supplement S30, 158, in order to rebut the presumption that the relevant place is the

28 Commercial Court Nanterre 15 february 2005 (*EMTEC*), commented upon by Shandro, *Insolvency of Corporate Groups*, in: *American Bankruptcy Law Journal*, May 2006, 30.

29 Court Munich 4 May 2004, ZIP 2004, 962 (*Hettlage*); ZIP 2004, 1064; NZI 2004, 450 (Mankowski); EWIR 2004, 495 (Paulus). See also Kübler, *op. cit.*, 541.

30 High Court of Justice (Chancery Division Companies Court) 15 July 2005, [2005] EWHC 1754 (Ch) (*Collins & Aikman Europe SA*).

place of incorporation, it will be necessary to show that 'the head office functions' are carried out in a member state other than the state in which the registered office is situated." The "evidence from the companies" (probably no other evidence was taken into account) was that the main administrative functions relating to the European operations had since 17 May 2005 been carried out from England including cash-coordination, pooling bank accounts from London, HR, IT, engineering and design and sales. The submission and evidence was that the registered office of each of the companies was in England and there was no material which would rebut the presumption that England and Wales was the centre of main interests of each of the companies. The court was satisfied on the evidence that the centre of main interests for each of the companies, apart from the English companies, were not related to the location of their respective registered offices, and added: "The objectives of the proposed administrations are to rescue the companies as going concerns and/or to achieve a better result for the companies' creditors as a whole than would be likely if the companies were wound up without first being in administration. And the proposed strategy is to seek to dispose of the European operations either as a whole or on a piecemeal basis. The strategy is the same as that previously determined by the Strategy Committee, though any disposals will take place in the context of administration proceedings. It is envisaged that this might lead to the sale of particular companies or a particular plant. It is thought that the likeliest purchaser is one more of the major customers of the European operations such as Ford, and Lazars are to be instructed by the administrators to advise in relation to this process."

#### 7. European Court of Justice 2 May 2006 (*Eurofood*)

How does this all relate to the recent decision of the European Court of Justice 2 May 2006 (Case C-341/04) concerning *Eurofood IFSC Ltd.*<sup>31</sup> These are the facts. Eurofood IFSC Ltd. is registered in Ireland in 1997 as a "company limited by shares" with its registered office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the whole Parmalat group. On 24 December 2003, in accordance with Decree-Law No. 347 of 23 December 2003 (*Amministrazione straordinaria delle grandi imprese in stato di insolvenza* or extraordinary administration for large insolvent undertakings; GURI No. 298 of 24 December 2003, p. 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who

appointed Mr. Bondi as the extraordinary administrator of that undertaking. On 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was based on the contention that that company was insolvent. The Irish High Court appointed, on the same day, Mr. Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf. Two weeks later, on 9 February 2004, the Italian Minister for Production Activities admitted Eurofood to the extraordinary administration procedure and appointed Mr. Bondi as the extraordinary administrator. This was followed a day later by an application filed before the Tribunale Civile e Penale di Parma (District Court, Parma) (Italy) for a declaration that Eurofood was insolvent. The hearing was fixed for 17 February 2004, Mr. Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofood was in a state of insolvency. Back to Ireland: by 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to Article 26 of the Regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr. Farrell as the liquidator. Mr. Bondi having appealed against that judgment, the Irish Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling. The European Court of Justice (Grand Chamber) 2 May 2006 rules as follows:

"1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be

<sup>31</sup> See ZIP 19/2006, with comments of Knof and Mock.

established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.”

The other important decision is that the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening state. Furthermore, the ECJ ruled that a decision to open insolvency proceedings for the purposes of Article 16's rules of automatic recognition is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets. This all means that the judgment based on the application on 27 January 2004 before the High Court (Ireland) must be recognised.<sup>32</sup>

## 8. Commentary

The presumption that for a company or legal person the centre of the debtor's main interests is the place of its registered office, but this presumption may be rebutted, *see* Article 3(1) last line, should be taken serious. It can only be rebutted “if factors which are both objective and ascertainable” by third parties enable it to be established that reality differs from legal form (the location at that registered office). The principle on which the given rule is based, is provided too by the Court (consideration 33): “That objectivity and that 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. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court

with jurisdiction entails determination of the law which is to apply.” The presumption therefore acts as a cornerstone in determining the international jurisdiction of a court. The ECJ provides two examples in this respect: (i) when a company is not carrying out any business in the territory of the Member State in which its registered office is situated, and (ii) where a company carries on its business in the territory of the Member State where its registered office is situated. In the first example (PO box companies; sham companies) the presumption may easily be rebutted. In the second example COMI could be in the other Member State, but “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. That is only possible if factors which are both objective and ascertainable by third parties would lead to that consequence. The ECJ seems to be reluctant to provide more clear and specific criteria, which is to be regretted. The contact with creditors approach is decisive,<sup>33</sup> but it remains to be seen whether all creditors are equal or a division should be made between “large” and “small” creditors and creditors with knowledge of certain (which?) facts in addition to parental control to rebut the presumption.

As explained earlier it is my opinion that the reference to “head office” in the Virgós/Schmit Report (1996), No. 75, has been taken out of the context as an explanation for the logic of the choice for the presumption and has been presented as an independent decisive factor for determining the COMI. Moss and Smith<sup>34</sup> for example explain their personal point of view in that a more correct approach would be to focus on the question of the location of the place from which “head office functions” are carried out rather than on the location of the head office. The “correctness” of this view however is based on norms which do not bear sufficient relation to the norms of Recital 13, in particular ascertainability by third parties of the place where the debtor administers its main interests. I do not disagree with the “correctness” of the view itself. The approach will have several benefits, including fewer procedural costs and a transparent method of tracing assets, due to the availability of all the group's documents, improving the possibility of selling parts of the business which economically form one business, but are legally broken down into several legal entities.<sup>35</sup> However, I disagree that the head office functions theory follows from the (interpretation of) the text, the history and the system of the Regulation. The theory (“head office functions”, “parental control doctrine”, “mind of management approach”), with emphasis on

32 Another important decision of the ECJ relates to the interpretation of Article 26 of the Regulation (public order) in that a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken “in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.”

33 Sometimes “business activity” approach, *see* Marshall/Herrod, The EC Regulation on Insolvency Proceedings: Mutual trust across Europe or a forum shopper's charter, in: Global Insolvency & Restructuring Yearbook 2005/2006, 21. The decision of ECJ 2 May 2006 puts a stop to what has been suggested that “it is now very well accepted that the concept of COMI is a very useful tool in centralizing the focus of a multinational EU restructuring”, *see* Shandro, *op. cit.*, 30.

34 Moss and Smith, *op. cit.*, 8.39.

35 *See e.g.* Taylor, Practical Difficulties in Handling Group Insolvencies, in: 1 International Corporate Rescue, Issue 4, 2004, 236.

typical group structure issues, should not be decisive.<sup>36</sup> It departs from the rationale laid down in the Virgós/Schmit Report (1996), No. 75, that third parties must always be able, in every system of insolvency, to calculate their risks. The COMI can hardly be ascertained by third parties without investigating the group structure. By emphasising the importance of the “interior” of the ties based on corporate and contract law and the managerial and operational structure of a group (to which the debtor belongs), third parties will not be able to make this calculation. The question should be considered too as to what happens when the group’s management simply decides to change its place of control. The head office functions approach then serves as an invitation for what the Regulation aims to avoid, i.e. forum shopping.

In the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constitutes a distinct legal entity and is subject to its own court jurisdiction, as the ECJ explicitly considers. The Insolvency Regulation leaves room for opening main insolvency proceedings for the whole of a pan-European group, but only based on objective and visible facts. As indicated, this may be regretted, but it is up to the Member States to decide whether the time has come to include provisions in the Regulation which deal with insolvency of corporate groups. Presently, in the context of the Insolvency Regulation in future the debate will concentrate on the question of which factors are both objective and ascertainable by third parties to enable it to be established that reality differs from legal form (the location at that registered office).

<sup>36</sup> See also in this way Duursma-Keppinger, *op. cit.*, Art. 3, no. 15; Kekebus, *op. cit.*; Kübler, *op. cit.*, 555; Prütting, *op. cit.*, 172; Penzlin/Riedemann, ZIP 2005, 1610, and Mankowski, EWiR 2005, 637.

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