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Defining COMI: where are we now?

KEY POINTS

- On 17 October the European Parliament's Committee on Legal Affairs presented a report to the European Commission, recommending reforms to existing European legislation on insolvency proceedings (the Report).
- One recommendation is to improve the definition of a debtor's centre of main interests (COMI) by revising the EC Regulation on Insolvency Proceedings 2000 (No 1346/2000) (the EC Regulation).
- At the same time the European Court of Justice delivered its judgment in *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* [2011] EUECJ C-396/09 (20 October 2011) (Interedil).

The EC Regulation governs the conduct and co-ordination of cross-border EU insolvencies. COMI determines which country's courts have jurisdiction and what law applies to main insolvency proceedings; there will be automatic recognition of insolvency proceedings opened in the jurisdiction of a company's COMI by the courts of other member states.

THE LACK OF ONE CLEAR DEFINITION

Article 3(1) of the EC Regulation says: "In the case of a company or legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary." Paragraph 13 of the preamble to the EC Regulation says: "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." The *Virgós-Schmit* Report contains similar wording.

WHAT DOES THE REPORT SAY?

The Report's main concern about the lack of a statutory definition of COMI centres around forum shopping. Recital A to the Report states: "Disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border operations which could become obstacles to a successful restructuring of insolvent companies".

It considers "those disparities favour forum-shopping and the internal market would benefit from a level playing field". The European Parliament suggest inserting a formal definition "based on the wording of Recital 13, which is concerned with the objective possibility for third parties to ascertain it". They state the definition should, "take account of such features as the externally ascertainable principal transaction of business operations, the location of assets, the centre of the operational or production operations, the workplace of employees, etc".

SENSIBLE INTERPRETATION OF COMI BY THE COURTS.

Since the arrival of the EC Regulation, there have been many decisions on COMI. The leading English authority is now the Court of Appeal case of *Re Stanford International Bank Ltd (In Receivership)* [2010] EWCA Civ 137 (*Stanford*) which applied the ECJ decision in *Re Eurofood IFSC Ltd* [2006] BCC 397 (*Eurofoods*).

In his Opinion to the ECJ in *Eurofoods*, Advocate-General Jacobs favoured the idea of a pure "head office functions" test (a test which had been applied many times before by the UK courts) which would focus on where the head office functions of a company were carried out. Following this Opinion, the test was adopted in *Re Lennox Holdings* [2009] BCC 155 by Lewison J. However, the ECJ in *Eurofoods* emphasised that COMI also had to be objective and ascertainable by third parties. The ECJ found the location of a company's registered office was key to determining its COMI: in order to rebut the presumption that the COMI was there, it would be necessary to demonstrate not only that a debtor regularly administered its interests elsewhere, but also that he did so in a manner that was objective and ascertainable by third parties. "Administration of interests" would necessarily cover a range of factual matters, both business and administrative operations.

In *Stanford*, Lewison J (at first instance) declined to follow his decision in *Lennox*, confirming he was wrong to have applied the "head office functions" test without focussing on objectivity and ascertainability. He said that pre-*Eurofood* decisions by English courts should no longer be followed in this respect. The Court of Appeal in *Stanford* agreed.

WHERE HAS *INTEREDIL* TAKEN THE DEBATE?

Interedil places a renewed emphasis on management and supervision (like the old head office functions test) without directly challenging the Eurofoods/Stanford approach. What we are left with is something of a hybrid. As *Interedil* also confirmed the primacy of Community law: it is *Interedil* not *Stanford* the UK courts must follow (at least according to the ECJ).

FACTS

Interedil was incorporated in Italy with a registered office there. It moved its registered office to London in connection with, and simultaneously with, negotiations that were underway in England to sell the business of Interedil to an English Company. Interedil was duly registered at Companies House in England as a foreign corporation under the Companies Act 1985. A solvent business sale concluded a few months later. As part of the sale, properties owned by Interedil in Italy transferred to an English company. Interdil later ceased all activity (although it seems some immovable property, a bank account and some lease arrangements remained dormant in Italy). Eventually Companies House removed Interedil from the register.

One of Interedil's creditors filed petitioned to wind up Interedil. Interedil opposed the petition arguing its COMI was in England, not Italy, following *Eurofoods*. The court of first instance and the court of

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jurisdiction in Italy considered that Italy had jurisdiction to hear the petition and that the COMI was in Italy. However, due to a degree of uncertainty, four questions were referred to the ECJ:

- Should COMI be interpreted in accordance with Community law or national law?
- If Community Law, how is COMI to be defined?
- Can the registered office presumption be rebutted if the company carries on genuine business activity in a State other than that in which it has its registered office or, to rebut the presumption, is it necessary to show the company had not carried out any business activity in the State in which it had a registered office (a subtle distinction)?
- Did the existence of the immovable property, lease agreements and banking arrangements constitute sufficient factors or considerations to rebut the presumption?

DECISION

Community law prevails on COMI: *Eurofoods* had already answered this question. It is Community law that member state courts should apply, not their own interpretation. *Interedil* reiterated this, by saying that COMI was a concept which "is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation" (para 43).

Definition of COMI: On the second question, the ECJ in *Interedil* unfortunately neither definitively defined COMI nor set out a full list of relevant objective factors and considerations to rebut the registered office presumption. This was understandable as COMI cases depend heavily on the facts.

Rebutting the presumption: central management and supervision important: The ECJ did not directly answer the third question. However, in considering generally how the presumption could be rebutted, the ECJ attached great importance to the place where the company has its "central administration" as being "the criterion for jurisdiction" (para 48). They said that, if 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 the third parties, the presumption cannot be rebutted". However, the court said, if it can be demonstrated that the "place in which an entity's central administration" is located somewhere other than the registered office, then the presumption can be rebutted (para 51).

Factors to rebut the presumption: business operations still count but aren't determinative. The ECJ admitted the factors put before the court (essentially the company's business operations), were objective and were in this case, likely to be in the public domain and so therefore ascertainable by third parties. However, they were not alone enough to rebut the presumption, without a comprehensive assessment of all relevant factors. The ECJ considered that, when determining COMI, factors "to be taken into account" include (provided ascertainable) "all the places in which the debtor company pursues economic operations and all the places in which it holds assets".

They did however make it clear that these factors cannot alone be sufficient: ascertainable management and supervision is key:

> "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 laid down by the European Union legislature 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." (para 53)]

HOW TO INTERPRET *INTEREDIL*

In *Interedil*, the ECJ ask the courts to consider the location of "the bodies responsible for the management and supervision of a company" (para 50). Does this just mean the *de facto* board? If it does, does the board have to be in the same place 24/7 or just the majority of the time? This is not always very easy for third party creditors to ascertain. *Interedil* suggests this information should ideally be made public but that is easier said than done. Creditors usually know more about a company's day-to-day business operations than its management and supervision. This means uncertainty remains for COMI determinations.

What would count? There are lessons to be learnt from COMI migration cases following *Eurofoods*. In *Re Zegna III Holdings, Inc* (unreported) prior to filing for administration, the company registered a place of business in England. It replaced foreign directors with English-resident directors, who carried out their functions in England. It got the new board of directors to resolve the company's COMI was in England and held subsequent restructuring meetings with creditors in England. Finally, and importantly, it communicated all this in writing to creditors as well as asking creditors to submit invoices to England.

In *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 the company relocated its head office and principal operating address prior to filing. It issued certain press releases/ announcements about its relocation. It opened its main operating bank account in England. It also registered as an overseas company with an establishment in England at Companies House under s 1048 of the Companies Act 2006. This is a particularly good idea as the register is in the public domain and therefore ascertainable by third parties.

CONCLUSION

Interedil still leaves the COMI definition unclear. Because EU law prevails practitioners will have to grapple with this uncertainty. Statutory definition is unlikely to meet the needs of every case without further interpretation by the courts. The Report points out the EC Regulation only applies to single entities not groups which has "important negative consequences". If the EC Regulation is to apply to groups in the future, it is unlikely a one size fits all approach to the definition of COMI will be adequate in any event. ■