

COMI AND INSOLVENCY JURISDICTION WITHIN THE SCOPE OF EU REG. 1346/2000. RECENT DEVELOPMENTS OF ECJ'S CASES LAW

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EUROPEAN INSOLVENCY JURISDICTION

Art. 3 of EU Regulation 1346/00:

“The Courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. 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”.



COMI (*Centre of Main Interests of the debtor*) identifies proper jurisdiction in insolvency matter

COMI IN EU REG. 1346/2000: A GLOBAL PERSPECTIVE

- COMI and jurisdiction to open an insolvency proceeding (art. 3 EU Reg. 1346/2000)
- COMI and applicable law (art. 4 EU Reg. 1346/2000)
- COMI and jurisdiction for proceedings related to insolvency procedure (art. 25 EU Reg. 1346/2000)
- COMI and the indirect influence of recognition of judgments concerning the insolvency procedure (art. 16 EU Reg. 1346/2000)

WHY IS COMI'S DEFINITION SO HARD TO BE MADE?

- No definition under art. 3 of EU Reg. 1346/00;
- As for legal persons and companies: COMI is presumed to be located at the registered office (but the presumption could be rebutted)
- Some useful indications by Recital 13:

"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".

“INTERESTS OF THE DEBTOR”, UNDER ART. 3: COMI AND GROUP OF COMPANIES

Two different approaches can be followed:

- 1) The so-called Creditors' contact approach:
 - Despite of the registered office, COMI should be where the debtor does business in a way that's ascertainable by third parties.
 - Classic approach of ECJ
- 2) The so-called Head office functions' test:
 - Despite of the registered office, COMI should be located where relevant decisions and economic choices are taken.
 - Classic approach of domestic Courts, especially in cases of Insolvency of companies that run in a group

IDENTIFYING “INTERESTS OF THE DEBTOR”, UNDER ART. 3: FORUM SHOPPING

Which is the relevant time for considering that a certain company has its COMI in a certain State?

- What if COMI moves after the insolvency filing but before the insolvency order?
- What if there is COMI's migration before filing for insolvency but when the company has just been in state of insolvency?

Art. 3 of EU Reg. 1346/00 does not answer to those questions.

COMI, RIGHT CONCEPT OF INTERESTS AND FORUM SHOPPING

The problems of COMI in case of companies that run together in a group and the questions concerning COMI and forum shopping create disagreement among ECJ and domestic Courts.

These issues are considered of crucial importance by the European Commission too (see public Consultation that the Commission has put).

COMI AND THE ECJ'S POINT OF VIEW

- **EUROFOOD CASE: C 341/04**, Judgment of 2 May 2006
- **STAUBITZ SCHREIBER CASE: C 1/04**, Judgment of 17 January 2006
- **INTEREDIL CASE: C 296/09**, Judgment of 20 October 2011
- **RASTELLI CASE: C 191/10**, Judgment of 15 December 2011

...compared to domestic Courts' judgments.

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EUROFOOD CASE LAW: FACTS AND PROCEEDINGS

DEBTOR: Eurofood IFSC Ltd

- Company registered in Ireland
- Wholly subsidiary of Parmalat spa, registered in Italy (Parma)
- Eurofood does not business on its own, it's only vehicle for raising money for Parmalat group
- Eurofood activity: only three transactions with Bank of America

Where is COMI of Eurofood?

In Ireland (where the registered office is located) or in Italy (where administrative decisions and economic choices are made)?

EUROFOOD CASE LAW: FACTS AND PROCEEDINGS

- 27.01.2004: application for compulsory winding up of Eurofood in Ireland and appointment of a provisional liquidator
- 10.02.2004: after the appointment of the Commissario straordinario for Parmalat group in Italy, a filing for an insolvency order against Eurofood was lodged before Parma's tribunal
- 20.02.2004: order of bankruptcy against Eurofood, in Italy
 - Eurofood COMI should have been in Italy, cause the actual interests of the Company were there
- 23.03.2004: order for winding up against Eurofood, in Ireland.
 - Eurofood COMI should have been in Ireland, where the company was registered
- The Irish Supreme Court (on the appeal of the Commissario straordinario) referred to ECJ

EUROFOOD CASE LAW: QUESTIONS (related to COMI)

Since the registered offices of parent company and its subsidiary are in two different MS, and the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, is the control of the parent company over the subsidiary (the shareholding, the appointment of directors) sufficient to rebut the presumption laid down by art. 3?

**(To be honest, the question had been wrong formulated:
doing business in Ireland in a way that was ascertainable
by third parties was a controversial fact)**

EUROFOOD CASE LAW: THE ECJ'S ANSWER

- Group of companies: insolvency jurisdiction has to be examined separately for each debtor;
- Need of **factors** (both **objective and ascertainable by third parties**) to rebut the presumption of coincidence COMI/ MS where the office is registered.
 - Which factors from ECJ's point of view?
 - Presumption is rebuttable: the so-called letter box company
 - Presumption is not rebuttable: if company does business in the MS where it is registered, mere control of economic choices by the parent company is not sufficient to move the COMI of the former where there is that of the latter (no application of Head office functions test).

EUROFOOD CASE LAW:THE ECJ'S ANSWER

- The answer of ECJ has been fair but.....why did the Court, having ruled that, identify Eurofood's COMI in Ireland?
- Eurofood was a classic example of letter box company, so the COMI should have been located in Italy!



Probably, the ECJ's outcome was an implicit reaction to the “Head office functions’ test”, mostly used by domestic Courts.

According to ECJ, the fact that economic choices are made by the parent is not sufficient to move COMI of the subsidiary to that of the parent.

(diff., i.e., see cases decided by Domestic Courts: Daysitek, Rover, Collins and Aikman, Enron Directo, Cris Cross Telecommunications Group etc.)

REACTIONS OF DOMESTIC COURTS AFTER EUROFOOD CASE LAW

- Formal reference to Eurofood case but actual disapplication of the proper ruling of ECJ.
- The domestic Courts carry on with the application of Head office functions' test:
- See examples:
 - **Eurotunnel** (French case, Trib. Comm. Paris, 2.08.06);
 - As for Italy:
 - **C Finance Group Service- Finpart International Group** (Trib. Milano, 10.08.06, 16.10.06)
 - **IT Holding financial S.A.** (Trib. Isernia, 10.04.09)
 - **Immobilink** (App. Milano, 14.05.08)
 - **Illochroma** (App. Torino, 10.03.09)

INTEREDIL CASE LAW: FACTS AND PROCEEDINGS

- Interedil S.r.l. was an Italian company whose office was registered in Monopoli (Italy);
- 2001, July: the registered office was transferred from Italy to London, where Interedil was registered as a Foreign company;
- 2002, July: Interedil was removed from the UK companies' register, apparently in result of a takeover;
- In Italy, Interedil continued to hold some immovable property, it was party of a lease agreement in respect of two hotel complexes and signed a contract with a banking institution.

INTEREDIL CASE LAW: FACTS AND PROCEEDINGS

- 28.10.03: filing for insolvency before Bari's Court against Interedil; Interedil challenged the jurisdiction of Italian Courts claiming that its COMI would have been in the UK. The company requested a preliminary ruling of the Italian Supreme Court.
- 24.05.04: Bari's Court opened an insolvency proceeding against Interedil. Interedil appealed the judgement.
- 20.05.05: the Italian Supreme Court confirmed the insolvency jurisdiction of the Italian Courts
- 6.06.09: Bari's Court stayed the appeal and referred to ECJ for a preliminary ruling

EUROFOOD CASE LAW: THE ISSUES

1. Has COMI to be interpreted according to national law or EU law? How is it defined and what are the decisive factors for its identification?
2. When can the presumption of Art. 3(1) of the EIR be rebutted?
3. Can immovable property, lease agreement in respect of hotel complexes and a contract with a bank point towards COMI or an establishment in a Member State?
4. Can national procedural rules preclude the interpretation of EU law by the ECJ?

INTEREDIL CASE LAW AND THE ECJ: THE PRIMACY OF EUROPEAN UNION LAW

Art. 382 c.p.c.: Italian Supreme Court's ruling on jurisdiction are binding and final for every lower Court.

What happens since a lower Court thinks that the ruling of the higher Court gave an interpretation of EU law which is in variance with that of ECJ?

ECJ states that:

“European Union law precludes a national court from being bound by a national procedural rule, according to which under which that court is bound by the rulings of a higher national court, where it is apparent that the rulings of the higher court are at variance with European Union law, as interpreted by the Court of Justice”

INTEREDIL CASE LAW: COMI ACCORDING TO ECJ

- COMI is an autonomous concept, whose interpretation has to be made only by reference to EU law.
- More importance should be paid to the company's central administration when establishing COMI
 - Presumption of COMI/MS where the registered office is located can be rebutted if "*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 other Member State*".
- Location of the COMI at the time of request to open insolvency proceedings is relevant to determine the jurisdiction. COMI's moving before the petition of insolvency does not change the jurisdiction (cf. Staubitz-Schreiber). ¹⁹

COMI AND FORUM SHOPPING

According to Eurofood, Interedil and Staubitz-Schreiber cases law, could one say that even forum shopping problems have been solved?

- ECJ gives importance to **ascertainability by third parties**. Is it sufficient to prevent forum shopping?
- **Probably no: see, i.e., Pin Group case.**
- The Italian solution to avoid change of jurisdiction when company's head office moves before insolvency's petition but after company is in insolvency's condition: art. 9 IIA
- The rule of "doing business in a regular way", under Recital 13.

Thank you for your kind attention