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The Centre of Main Interests
*- A troublesome phrase in the EC Regulation
on Insolvency proceedings*

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Summary

After much work and a long time after its instigation, a legislation regulating insolvency law in the European Union finally saw the light of day in 2002. Its 47 articles and 33 recitals establish jurisdiction, choice of law as well as recognition, in cross-border insolvencies within the EU and with this new legislation came a new expression to the legal area, namely ‘centre of main interests’. As this locution is a decisive factor when establishing the Regulation’s applicability it is of the utmost importance that the term is properly understood and uniformly used. In the regulation itself very little guidance is given in this respect and hence, litigation has begun to emerge in the countries around the EU. As large international corporations exist all over Europe, it is not unusual for a company that has business in several countries to become insolvent and bring this issue to the fore.

Different courts in different countries have all done their best in trying to give life to the fairly new regulation and its rules, but in this essay’s specific area more is needed to reach a satisfactory state of affairs. However, many similarities can be seen in the courts’ judgments as to what they consider important when trying to establish a company’s COMI. This can give some idea on how the expression is to be understood, albeit national courts’ decisions are not a reliable source of law in an international context.

In comments to these cases and to the Regulation itself, many authors have given their thoughts on the situation, and consequently there is now some helpful material available to us. What’s more, the explanatory report regarding the Convention on insolvency proceedings, has been suggested by both authors and courts as a useful text for help with interpretation, but as it is not an official document and has not even been properly published, it remains unclear to what exact extent it can be used.

However, the only real authority when it comes to this sort of legislation is the European Court of Justice and recently, a case has been referred there for interpretation of the troublesome phrase. The court has yet to deliver its findings, so for now the conclusion will have to be that the uncertainty continues, but hopefully not for much longer.

Abbreviations

BCC	British Company law Cases
BSE	Bovine Spongiform Encephalopathy
CEO	Chief Executive Officer
COMI	Centre of Main Interests
EC	European Community
ECJ	European Court of Justice
EIR	European Insolvency Regulation
EU	European Union
EWHC(ch)	England & Wales High Court (Chancery Division)
IFSC	International Financial Services Centre
ILPr	International Litigation Procedure
Insolv Int	Insolvency Intelligence
Insolv LJ	Insolvency Law Journal
Ltd	Limited Company (UK)
NILR	Netherlands International Law Review
PLC	Public Limited Company (UK)
RIC	Rättsinformation C
UK	United Kingdom
US	The United States (of America)
WL	WestLaw

1 Introduction

As is well known by now, the European Community seeks to facilitate and protects its internal market with equal rights and opportunities for all, irrespective of their nationality or domicile. This is indeed perhaps the most basic and fundamental aspect of the Community and pervades many, if not all, of the standards and laws that are created for and by its members. The most obvious example of this may very well be article 3 in the EC Treaty that cites several factors that are important enough to be part of the Communities most essential principles, which literally are the EC's corner stones.

As you would expect the same way of thinking is intended to also apply to Europe's new common insolvency law. Within this legal area, one of the main obstacles from enjoying equal treatment has always been the question of where you conduct your business and where your debtor has his or her assets. There was a possibility to move assets from one jurisdiction to another and in that way avoid it being part of the winding-up of a company (so-called *forum shopping*). In the absence of any international law, it became troublesome to mitigate the problems with different countries' laws, especially in a time when more and more companies had branches and subsidiaries in several countries. When considering the aim of the EC this situation was unfortunate to say the least and it was decided that something had to be done to rectify the problem with this potential unequal treatment. One suggested solution was to create Community legislation that would guarantee a fair and equal treatment of all concerned parties.

1.1 Background

In 1995, a first attempt was made with a Convention on Insolvency Proceedings. It was to mediate between national laws and smooth out any friction. This convention unfortunately never came into force. This meant

that the legislation had failed and the negotiations had to start again. The failed attempt was followed a few years later by the EC regulation on cross-border insolvencies¹ that, unlike its predecessor succeeded at being ratified by all parties and came into force in May 2002. It endeavours to further facilitate the internal European market and is partly aimed at eradicating the problem of ‘forum shopping’ when it comes to insolvencies².

The largest issue with the employment of the Regulation is however that for it to be at all applicable, the debtor’s ‘centre of main interests’ (COMI)³ must be ascertained. The COMI of a company is, as the phrase suggests, the location where one can say that the ‘heart’ of the business lies and can therefore be used as a starting point for the company’s ascertainment in an insolvency proceeding. The trouble with this is that the phrase has not been properly defined in the Regulation and there is consequently room for discussion or indeed litigation. There have been some cases around Europe where the problem has been brought to the national courts’ attention (see more below) but as one country’s court’s decision is not binding for other countries, it takes us no closer to a conclusive solution of the uncertainties. This issue is further important since the establishment of jurisdiction also brings with it the choice of applicable law – *Lex Concursus*. If one country is “awarded” the company in question’s COMI, then this state’s law shall also govern the insolvency proceedings⁴. One would therefore not be wrong in saying that the accurate establishment of the COMI is of the greatest importance, both to the insolvent company and to the country opening the proceedings, not to mention for the various debtors involved.

What is needed is really for the issue to be brought before the European Court of Justice, as it is the only authority that can officially interpret the Community’s regulations. To date - as far as I have been able to find - the ECJ has not done so and in the absence of such guidelines it is up to the

¹ Council regulation (EC) No 1346/2000 on insolvency proceedings

² *ibid.* recital 4

³ *ibid.* art 3(1)

⁴ *ibid.* art 4(1)

national court's to try to decide on their own. Thus, it can prove quite difficult to definitively establish the COMIs' location in any given case.

'The trouble with COMI' is closely connected to the Regulation and is a highly topical concern. There are, as we shall see below, many issues as well as much material to take into consideration when one tries to come to terms with the condition that is this essay's focus.

1.2 Aim and Purpose

The purpose of this essay is to try to give as clear an overview as possible on the expression 'Centre Of Main Interests' that is central to determining the applicability of the Insolvency Regulation 1346/2000. As the area currently is in a somewhat indeterminate state, I will try to shed some light on the uncertainties and on what is being done to remedy the situation.

I also hope to be able to give a reasonably clear picture of what the situation is today, as well as how it has evolved so far and finally, what we may see in the future.

1.3 Method and Material

The method I have been using is traditional legal method, meaning I have studied statutes, literature, articles and case-law pertaining to the subject matter. The topic is quite new as well as of current interest and therefore the literature written on the Regulation is often quite broad in nature and mostly descriptive, meaning that the most current and interesting material is to be found in legal journals around Europe. Thus, not surprisingly, my material is predominantly in English and as the issue is international in character, it seemed the obvious choice to write in English.

I have put a great value on being as up to date as possible and will therefore concentrate on the information found in journals (both printed and internet-

based) and case-law, this to ensure an accurate description of the situation today. It is in relation to this something of a pity that the ECJ had not yet published its findings in the COMI related case referred to them, at the time of concluding this essay.

It is worth noting that when interpreting an EC Regulation, such as the one at hand, the national courts' decisions used herein do not in any way enjoy any status as official interpretation material⁵. However, as this material is the only that is available to me, I have chose to use it as a means to describe what the consensus on the subject at hand – if any – is.

1.4 Delimitations and Disposition

In this essay, I have chosen to concentrate on the specific question of how to interpret the expression COMI as well as how it has been used when applying the European Insolvency Regulation (EIR). The subject matter is quite a narrow one and I hope to be able to make this text an interesting read in spite of its lack of topical width. Moreover, as the case to be decided by the ECJ - described below - has not yet been settled, I have chosen to omit the court's findings from this essay, as there is no telling when the judgment will be published.

The cases that I have chosen to use have been selected primarily based on connection with the topic (as there are not a great number of cases available), and when it comes to cases from countries other than Sweden and the UK I have chosen those that have been available in a language I can comprehend.

The opening part of the essay will be aimed at giving an introduction to European insolvency law and especially its fairly new Regulation, followed

⁵ The only material that in truth can be used is for example the treaty itself and the parties' intentions at the time of drafting - as described in the Vienna convention, section III, article 31. See further Linderfalk "Om tolkningen av traktater" (2001)

by an explanation of what the problem I am writing about is, and what parts and considerations it consists of. I will also try to explain the phrase COMI in itself and give some information on how it is supposed to function.

A vital part of the study of this topic will furthermore be the case-law that has emerged so far. I will go through some of the most important litigations that until now have arisen, that have tried to apply the Regulation's wording. These cases are aimed at giving at least a hint of how the legal authorities across Europe believe the Regulation should be used, and indeed have been used to date. I will also endeavour to summarise what the courts' common views so far are.

Further on I will go through and analyse the very recently published and quite important General Advocate's opinion in a case that has been referred to the ECJ and has direct applicability on the question at hand. His opinion will surely prove significant, if not crucial to a possible solution to the problem I aim to investigate. This even more so as the ECJ in itself has not at the time of writing yet published its final judgment in the case.

Last, but by no means least, a conclusion will follow that is meant to try to summarise the situation today, as well as in the near future, not in the least in respect of the ECJ's upcoming verdict that will most certainly affect the application of the Regulation in this specific part.

2 Council Regulation 1346/2000 on insolvency proceedings

2.1 Background

As mentioned above, there was a dire need to alleviate the problems that were caused by the lack of international law and national courts not wanting to accept other countries' decisions. The only real option was to create legislation on a Community level and this work in fact began as early as when the Foundation Treaty (Rome Treaty) was signed in 1957. In the Rome Treaty there was included an article⁶ that required the member states to create various Conventions, one of them aimed at simplifying the "reciprocal recognition and enforcement of judgments"⁷. This work began its slow process in the 1960's with a group of experts (from the then six member states) that eventually published its proposal in February 1970. This text was called the Preliminary Draft Convention⁸ and continued its evolution after the addition of 3 new member states in 1973, now with the goal being that all 9 members would commit themselves to it. There were severe modifications because of the criticism it was subjected to after its first publication and also because of the different wishes of the new members.

Work advanced slowly until 1980 when a new proposal was ready to publish. This was the Draft Convention⁹ and was submitted to the Council for deliberation and even possible adoption. However, there was still harsh criticism from several members and this resistance grew so strong it was deemed unfeasible to continue work on the Draft. Consequently, this resulted in it being abandoned and a further number of years passed before the work once again was resumed.

⁶ Rome Treaty (1957) art 220(4)

⁷ *ibid.*

⁸ E Comm Doc3.327/1/XIV/70-E

⁹ E Comm DocIII/D/72/80

The third attempt at constructing this legislation started with the initiative of the Council of Ministers and this time, unlike before when much of the work had been kept secret, publicity of the work in progress was encouraged as to create a greater transparency and let criticism and objections be heard at an early stage¹⁰. The group let themselves be inspired not only by the previous efforts but also by the so-called Istanbul Convention¹¹ and a more politically acceptable version was eventually forged and presented to the Council of Ministers on 25 September 1995, while during the work the Community had had time to change its name to the European Union¹² and Sweden together with Finland and Austria had become members in January 1993.

However, despite all improvements and modifications to the Convention, it failed to come into force at the last minute. The draft had been published and was subject to a six-month signing period, when the member states could analyse the text in detail and then sign, when satisfied. All now fifteen members needed to sign for the Convention to become reality but after much uncertainty the United Kingdom failed to do so, resulting in the text to once more be abandoned.

The reasons for the U.K. not signing have been subject to a fair amount of discussion. At the time of the six-month time limit the BSE debacle was in full bloom in Europe and there were suggestions that dissatisfaction with the trade restrictions had resulted in this opposition¹³. Others submit that the real reason was that the U.K. Government thought it uncertain if the Convention would apply to the colony of Gibraltar, this ambiguity precluding the acceptance of the text¹⁴.

¹⁰ See Fletcher, "The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide" (2002) at p 3

¹¹ European Convention on Certain International Aspects of Bankruptcy, ETS No 136

¹² With the coming into force of the Maastricht Treaty on 7 February 1992

¹³ See Mellqvist, Mikael, "Gränsöverskridande konkurshantering, EU:s konvention om insolvensförfaranden" Ny Juridik, (1996) no 4, p 9.

¹⁴ See Fletcher, "The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide" (2002) at p 5.

In 1999 the project sparked up once again, this time as a Regulation. With small and few alterations from the final text of the failed Convention¹⁵, the legislation could finally be adopted by the Council on 29 May 2000 and then came into force two years later 31 May 2002. It affects all member states except for Denmark, that has a permanent exemption from any Community instruments created on the basis of the EC Treaty article that the Regulation rests on¹⁶.

2.2 Features

The Regulation on Insolvency Proceedings is not an attempt at harmonising the entire EU's insolvency law. What it does do is first and foremost in chapter I¹⁷ regulates the jurisdiction and choice of law of any insolvency proceedings that is to be opened within the EU territory¹⁸, as well as assorted matters associated with any such events. Another very important part of the Regulation is that it in its chapter II¹⁹ supplies provisions on international (European) recognition of cross-border insolvencies²⁰. This is of course vital if any attempt at regulating international insolvencies is going to be successful. The articles provide that insolvency proceedings opened by a court (with jurisdiction pursuant to article 3) in a member state, shall be recognised in any other member state, there giving it the same effect as under the law in the state where the proceedings were opened²¹. The reason for this is to bring order to the procedures and not have competing liquidations across the Union. There is no need for any special official procedure to ensure this recognition²².

¹⁵ See "The EU Regulation on Insolvency Proceedings", at p 1

¹⁶ EC Treaty art 61(c)

¹⁷ EC Regulation 1346/2000 art 1-15

¹⁸ See Fletcher, "The Law of Insolvency", at p 830

¹⁹ EC Regulation 1346/2000 art 16-26

²⁰ *ibid.* art 16

²¹ *ibid.* art 17

²² *ibid.* art 17(1)

Chapter III²³ and IV²⁴ governs the so-called secondary proceedings that can be opened in any state²⁵ where the company has an establishment²⁶, as well as duty to provide information in the case of various requests that can be made by interested parties. Finally, chapter V²⁷ deals with the coming into force of the regulation, how it should be amended and other various questions that may arise.

2.3 Virgos-Schmit Report

When the earlier attempts at legislating European insolvencies were under way, voices were raised that the text was complicated and would be difficult to apply as a result thereof. Hence, a detailed and well worked-through report was created to facilitate the Convention's usage. It was called the "Report on the Convention on Insolvency Proceedings"²⁸ (Virgos-Schmit Report) but was never approved by the Council and never actually published. Since the Convention it related to never became reality one may argue that the report now therefore is immaterial, but since the Regulation currently in force resembles its predecessor to such a great extent the Report is in many ways an excellent tool to better understand the current legislation. It is however not by any means to be considered a source of law, but merely a guide to gain insight into the intentions behind the European insolvency law. Albeit the Regulation does have its recitals in the preamble that normally are supposed to clarify what the Virgos-Schmit Report might also be considered to enlighten, these are however not either to be considered a source of law and in case of a conflict between the Regulation's text and its recitals, the text will always prevail²⁹.

²³ *ibid.* art 27-38

²⁴ *ibid.* art 39-42

²⁵ other than that which have opened main insolvency proceedings according to article 3(1)

²⁶ EC Regulation 1346/2000 art 3(2)

²⁷ *ibid.* art 43-46

²⁸ Virgos and Schmit, Report on the Convention on Insolvency Proceedings (1996), not published

²⁹ See Fletcher, "The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide" (2002) at p 27 as well as case C-412/93 *Société d'Importation Edouard Leclerc Siplec v TFI Publicité SA and another*

The Regulation currently in force takes its phrasing of the article here in question (article 3(1)) essentially straight out of the previous convention, thus strengthening the argument that the Report can, and perhaps even should, be used as an interpretation tool. It tries (other than lending its text to the Regulation's 13th recital) to shed some light on the specific wordings and terminology of the legislation in paragraph 75 (here in its entirety):

"The concept of '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 to third parties.

The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting 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.

By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres. In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Convention 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."

Here an attempt is made at explaining what the authors of the Regulation/Convention had in mind at the time of drafting the text and what

they want to protect as well as facilitate. When the ‘rationale of the rule’ is explained it is clear that what the drafter have wanted to protect was the transparency and predictability of the Regulation, two words that are quickly recognised from the general principles of the EC Treaty.

The Virgos-Schmit Report is all in all the best material for interpretation currently available to us³⁰ and is still being referred to by authors³¹ and EC Commission officials, as for instance in the recently delivered view of the Advocate General Jacobs concerning case C-341/04 Eurofood IFSC Ltd where Jacobs mentions the Report as “useful guidance”³². Closer to home, in the RIC 17/04 case, the Helsingborg District Court refers to it with that it “must be deemed as appropriate guidance”³³. The report is closely related to the legislative text and is as seen by many considered as a very important help. However, its true value as a legislative document is still somewhat unclear, not least because it was never even adopted as an official text by the Council of Ministers.

2.3.1 Other considerations

In the above quote from the report it would seem that what is suggested is that one should try to look more to the relevant facts and circumstances, than just the company’s state of incorporation. These facts may differ from case to case and it is by no means obvious what exactly is meant by the term ‘interests’³⁴. The approach that the report’s authors want us to take is that of “substance over form”, in the sense that it may not matter where one is incorporated if other facts suggest another state³⁵. This points to that the correct principle to use when determining jurisdiction in insolvency law in

³⁰ Not considering that it still is not officially published

³¹ See Fletcher, “The Law of Insolvency”, at p 831 in footnote 37 where he deems the report potentially helpful, but also emphasises its lack of authorisation.

³² Case C-341/04 Eurofood IFSC Ltd, Opinion of Advocate General Jacobs delivered on 27 September 2005, at para 2

³³ RIC 17/04 at p XXX

³⁴ See further discussion in chapter 3

³⁵ In the final text of the current Regulation this is obviously embodied in the presumption contained in article 3(1).

Europe is today the 'real seat' doctrine. This doctrine is used in several European nations, for instance Germany, and states that the important factors to consider when establishing jurisdiction and choice of applicable law are not so much where the company *de facto* is incorporated, but instead where it really can be considered to conduct its business, hence, real seat. The opposite of this is the incorporation doctrine (UK and US for example) that simply states that jurisdiction is based on in which state the company has its registered office.

Quite recently, there have been a number of cases that have been through the ECJ concerning questions of jurisdiction in *company law*. The corollary of these judgments appears to be that the court favours the Anglo-American preference of the incorporation doctrine. It is very interesting, although well outside the scope of this essay that the two areas of insolvency law and company law that often, if not to say in many cases naturally, come into contact with each other are viewed upon in Europe in these two rather different ways.

3 COMI explained

A crucial part of the EC Regulation on insolvency proceedings is thus the expression “centre of a debtor’s main interests” contained in article 3(1).

“3(1). 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.”³⁶

From this we are able to establish that the company can only have its main interests in one state and hence main insolvency proceedings can only be opened there. Furthermore, the presumption that the place of the registered office is the COMI is a rebuttable one³⁷.

As further has been established by now, the phrase COMI has never been as properly defined in the Regulation as one perhaps could have wished that it had been. What the reason for this omission was, one can only speculate, but a good guess may be that it was simply too difficult to reach an agreement, leading to this specific detail being left out, probably to be solved in case-law.

Albeit not containing an official elucidation to the phrase, the article includes a presumption that the “centre of main interests” should be considered to be where the company has its registered office³⁸. This may seem fairly uncomplicated and has been commented upon as being a “very

³⁶ EC Regulation 1346/2000 art 3(1)

³⁷ See Fletcher, “The Law of Insolvency”, at p 836

³⁸ EC Regulation 1346/2000 art 3(1)

helpful” presumption that may be hard to rebut³⁹. The question remains though, what is to be done in the cases where a company is incorporated in a State where it conducts no business, owns no property and has no employees? There is hardly any point in starting main insolvency proceedings in this State, when the company clearly conducts all its business elsewhere. Thus, the presumption can be rebutted, but in the absence of a proper definition of the centre of main interests it can in some situations prove difficult to do so, since the presumption will stand “in the absence of proof to the contrary”⁴⁰. The only help available to the interpretation of COMI and to establish this proof is recital 13 in the preamble to the Regulation. This recital 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.”⁴¹

This may well be considered a better way of reflecting a member state where one would (based on some sort of ‘common sense’) regard the company to have its main business. It is not a completely uncomplicated matter however to decide on where this place is in all cases because of the apparent lack of clear guidelines or definitions. One might even say that it could almost be up to the courts’ arbitrariness to decide upon where the company has its COMI. This is of course unsatisfactory, as the Regulation must facilitate transparency and predictability for all parties, in order to assist cross-border trade within the Community. The wording of recital 13 is (as explained above) taken essentially straight out of the Virgos-Schmit Report⁴² and sheds some light on how the drafters meant for article 3(1) to be interpreted, albeit not making its meaning unequivocal and uncomplicated.

³⁹ See Mellquist, Mikael ”EU:s förordning om insolvensförfaranden – en följetong i europeisk insolvensrätt, del 1”, at p 26

⁴⁰ EC Regulation 1346/2000 art 3(1)

⁴¹ *ibid.* recital 13

⁴² Virgos and Schmit, Report on the Convention on Insolvency Proceedings (1996), para 75

The authors try to give a brief explanation of the terms that together form the phrase in question. The two words ‘main’ and ‘interests’ are commented upon and given extra substance as an attempt is made at giving them a definition that later - as the convention was turned into a regulation - was omitted. In the paragraph the word ‘interests’ means that many forms of business and activity are encompassed, both professional and industrial as well as consumers’ dealings, equating to roughly all trade thinkable. Of course this both means that the expression is given a very wide scope and at the same time, a somewhat vague meaning. Further on, ‘main’ is simply described as a decisive factor to be used when multiple places of business can be found. Hence, in the case of more than one places of business, only one state can start *main* insolvency proceedings. The observations seem fairly uncomplicated and has indeed been commented upon by Mellqvist as not making it much easier to identify the place that the locution COMI is supposed to point to⁴³. However, he also states that as the presumption in article 3(1) of the Regulation will most certainly cover most if not almost all situations, the problem will not be a big one. He deems it therefore probably rare that two different countries will compete to open main proceedings. Despite this, several cases have emerged where this question was taken to court - as will be covered in the next chapter - but worth noting is that Mellqvist’s article was written well before the Regulation even came into force.

What then is needed in the future is a clarification of what the important circumstances are when defining a debtor’s COMI and this can only be achieved by way of case-law from the European Court of Justice (ECJ). Even though the uncertainty concerning COMI has produced litigations, it has only been scrutinised by national courts, which decisions cannot bind other Member States. Thus, what is needed is for a case to be referred to the ECJ where the Regulation can be properly interpreted and explained. No

⁴³ See Mellqvist ”EU:s förordning om insolvensförfaranden – En följetong i Europeisk insolvensrätt – Del 1” at p 26

case has to date made it all the way through the European Court of Justice and until one does, we are likely to see more litigation on the subject.

There have however, been a few cases that have dealt with this problem and various courts around Europe have suggested solutions to the problem. The tendency though seems to be that the courts are inclined (with a few interesting exceptions) to give judgment in favour of their own State, perhaps not surprisingly. Below I shall discuss a few recent cases and their implications in some detail. The most recent of them may even be the one that once and for all settles the problem of this great uncertainty.

4 Case-law

So far there has been quite a few cases where this question has had to be considered by courts in all instances. In the past few years since the regulation came into force several courts in numerous countries have tried to get their heads around how to best interpret article 3(1) in correlation with recital 13. There have been situations where courts in different countries did not agree on where to place the COMI in the case at hand and this is perhaps not a bad thing. If the countries' national courts do not agree on community law, then the European Court of Justice will have to settle the question for them by giving the community's view on how the insolvency regulation should be interpreted, thus providing guidance to future emerging disputes. As we have not yet seen a case go all the way to be decided by the ECJ, we have to in the mean time turn our focus to the cases that have emerged on a national level to give us some idea on how the Regulation has been applied so far.

I here intend to go through some of the case-law in first and foremost Sweden and the UK. I will concentrate on the ones that are of the most interest to the question at hand, with the aim to find the issues that so far seem to be most important.

4.1 Swedish case-law

4.1.1 RIC 29/03

In this case a limited company, which was registered in Finland, had filed for insolvency proceedings to be started in Sweden, claiming that the company's main interests were in fact there and not in Finland. As grounds for this claim the company (Radaflex OY) said to have virtually no business in Finland and that all its trade was done out of its Swedish branch. Despite the fact that the activities in Sweden was now under termination Radaflex

claimed that since it had debts (for example unpaid salaries to former employees), as well as claims for work carried out in connection to the branch, its main interests should be held to be in Sweden, thus rebutting the presumption in article 3(1) of the regulation. Furthermore Radaflex had 50,000 euros deposited in Finland but this account belonged to the Swedish branch, therefore making the company's only connection with Finland, besides its incorporation, a small debt regarding a leased car.

The Swedish District Court, to which the company had petitioned, after having established the presumption that the company's COMI is where it is incorporated, came to the conclusion that Radaflex had not managed to show that it had enough of a connection with Sweden (partly because its activities in Sweden was under termination and did not conduct any business) to rebut the presumption in the article in question. Therefore it held that Radaflex had its COMI in Finland and hence that the Swedish court could not be competent to start insolvency proceedings.

Radaflex appealed to the Swedish Court of Appeal, moving for it to overturn the District Court's decision. The Court of Appeal considered the facts mentioned above again and also established that the company had no visitor's address, as well as no employees in its state of incorporation, further lessening its connection to Finland. All in all this made the Court of Appeal hold that Radaflex now in fact *had* shown that its centre of main interests should be considered to be in Sweden, and therefore sent the case back to the District Court for insolvency proceedings to be commenced.

4.1.2 RIC 17/04

In this case a physical person (L.V.) had been petitioned for bankruptcy in Sweden by the Swedish National Tax Board in the District Court. The case was appealed to the Court of Appeal by L.V. The facts of the case were to an extent quite complicated and concerned in various degree a hand full of companies that L.V. was connected with. He claimed that he had now

moved to London, UK and that this was now his domicile, thus making the Swedish courts not competent to declare him bankrupt.

After having established that the Insolvency Regulation was indeed applicable, the court went on to consider the facts on which the COMI should be decided. In the case of a physical person, the centre of main interests should be located where the person has his or her domicile⁴⁴, but this is however not completely decisive. Seeking further guidance the court consulted the Virgos-Schmit Report (as mentioned above) and quoted paragraph 75, commenting that when the case is regarding a physical person one should also take into account what has been “ascertainable to third parties”⁴⁵, as in the case of legal persons.

The Court of Appeal, when considering the facts and claims, established that L.V. had not made the change of address to the UK until *after* the petition for bankruptcy was made with the District Court, and the address reported was a London post-office box. During the earlier court proceedings in the first instance court he had stated another UK post-office box as his residential address, resulting in that the Court of Appeal now concluded that his domicile was un-ascertainable. This made his connection with the UK “limited to partnership in a number of different companies, about which very little is known, a post-office box address and a telephone and faxnumber”⁴⁶. In the end, the court held that Sweden was in fact the country where L.V. had his COMI, thus concluding that the District Court had been correct in giving its judgement and the Court of Appeal therefore dismissed the appeal.

⁴⁴ See Mellqvist, *EU:s Insolvensförordning m.m. – En kommentar*, at p 106 and also the Virgos-Schmit Report, para 75

⁴⁵ EC Regulation 1346/2000 recital 13

⁴⁶ See the Court of Appeal’s judgment in RIC 17/04

4.1.3 RIC 12/05

The company Kosingen Ltd - incorporated in the UK - was as in the previous case, petitioned for insolvency proceedings to be commenced in the District Court of Malmö because of an unpaid tax debt amounting to roughly 50,000 SEK. Kosingen Ltd claimed to never have traded at all in Sweden and didn't seem to have any business in the UK either. It appeared that the only activity the company had was that of being a limited partner in a Swedish limited partnership called Soveden Brodyr Top Emblem KB, and Kosingen's investment was limited to 1000 SEK.

As Kosingen Ltd was not represented at the court proceedings in the District Court, the court first established it self as competent and then held that insolvency proceedings should be commenced. The company appealed the decision, now claiming that it was no longer a partner in the Swedish company and therefore the presumption in article 3(1) could not possibly be rebutted (as mentioned above, the presumption that a company's COMI should correspond to the state of incorporation, should be rather difficult to refute). The second instance court investigated the facts again and first of all came to the conclusion that Kosingen had disposed of its partnership in the Swedish KB *after* the petition to the District Court had been made, but *before* the company was wound up. This made the fact that it no longer was a part of Soveden Brodyr Top Emblem KB immaterial, as it is the circumstances at the time of petitioning for insolvency that are decisive. Furthermore it seemed that Kosingen's only activity at the time of the petition was that of being a limited partner in the Swedish partnership. This was Kosingen's only means of income and its profits originating from it had also been taxed in Sweden. The court then established that, seeing that all business had been managed out of the Malmö office, this would also be the premises that would have been "ascertainable by third parties", a reference to the EC Regulation's 13th recital. Hence, the appeal was denied.

4.2 UK case-law

4.2.1 Re: Brac Rent-a-car⁴⁷

This case is not concerned with exactly the question this essay tries to answer but it does contain a very useful and interesting discussion about what might be deciding factors when defining a company's COMI. BRAC Rent-a-car was a company incorporated in the state of Delaware in the US, this state being famous for its "laissez-faire" approach to company regulation. However, the company had no employees in Delaware, neither did it have any business there. In fact, it had never traded in the US at all. Its office was instead located in Hemel Hempstead in the UK, where all its property were and also where all of the company's employees worked, apart from a small branch office in Switzerland.

The company was petitioned for an administration order in the UK and the question arose if an English court really had jurisdiction to make such an order against a US company. Mr Justice Lloyd clarified his reasons at length in the judgment and came to the conclusion that he was right to issue the order. The question he asked himself was if the European Insolvency Regulation really gives a British court jurisdiction to act in the way it did. He first established that the Regulation has direct effect in all member states and then turned his focus to the question of how to interpret the expression "centre of main interests" in article 3(1). Then after establishing that the Regulation itself really offers no help in defining COMI (apart from recital 13), he went on to seek guidance in the Virgos-Schmit Report. This report - as stated above - actually applies to the Convention on Insolvency Proceedings, but after some thought, Lloyd, J decided that it was appropriate to use when trying to interpret the Regulation.

If it could be shown that the company had its centre of main interests in the Community, then the Regulation would be applicable, which in turn gives

⁴⁷ Re: BRAC Rent-a-car International Inc (2003) WL 117146

jurisdiction to the UK court, and this was indeed the case as Lloyd, J explains in the first part of the case where he listed the reasons why BRAC Rent-a-car's centre of main interests was in the UK and not in the US⁴⁸. Important factors were for instance that the company never traded in the US, but did so solely out of the UK, it also had all its employees there and English law governed the company's contracts. All these aspects, together with recital 13 of the Regulation, led the court to the conclusion that BRAC Rent-a-car's had its centre of main interests elsewhere than its registered office, and accordingly rebutted the presumption in article 3(1) of the EC Regulation. (These factors proved to be important again in a later case, as we shall see below.)

Altogether Lloyd, J came to the conclusion that since the company's COMI was in the UK (and therefore in the Community) the EIR applied, giving jurisdiction to a court in a Member State to issue an administration order in relation to the company even though it was incorporated outside the Community.

4.2.2 Re: Daisytek-ISA Ltd⁴⁹

In the case of Daisytek-ISA Ltd, there were involved many separate companies, spread over several countries, mainly in Europe. The parent, Daisytek International Corporation, was an American company that owned subsidiaries in the US as well as in the UK. Its UK subsidiary was Daisytek-ISA Ltd, which in turn was a holding company to a number of other corporations. These were three companies in Germany, one in France and another 10 in the UK. In this very complex corporate structure, Daisytek-ISA's subsidiary ISA International PLC was a holding company for a business (ISA International Holdings Ltd) that in turn was a holding company for PAR Beteiligungs GmbH and ISA Daisytek SAS (France). The German firm was a holding company for the other two German corporations

⁴⁸ Re: BRAC Rent-a-car International Inc (2003) WL 117146 para. 4-6

⁴⁹ Re: Daisytek-ISA Ltd (2003) WL 21353254

and all of the various businesses had loan guarantees criss-crossing the entire structure.

The American parent, Daisytek International Corporation filed for a chapter 11 reorganisation in May 2003 and the European companies consequently petitioned for an administration order to be made. The question at hand was whether the English courts – by way of the UK holding company – had jurisdiction to make administration orders for the French and German companies and if so, for what reasons.

The court established that they had jurisdiction if the companies that were incorporated in other Member States had their centre of main interests in the UK, according to the EIR article 3(1). Much like in *Re: BRAC Rent-a-car* various factors were considered to determine the locations of the firms' COMI. Important features were:

- 1) The German and French companies' finance functions were all run out of the head office in Bradford, UK (ISA International PLC), and they used English accountancy principles.
- 2) No purchase above the sum of 5000 Euros could be made without the consent of the head office.
- 3) Senior employees were hired in cooperation with ISA International.
- 4) All IT and support were in Bradford.
- 5) The head office handled all the concern's pan-European customers.
- 6) ISA International in Bradford negotiated the purchase contracts covering 70% of the businesses' purchases.
- 7) The German and French companies had to follow a management strategy plan, set out by the CEO of Daisytek-ISA Ltd.

Another important issue the court had to address was the part in the Regulation's 13th recital that states that the COMI should also be "ascertainable to third parties". As in an earlier case⁵⁰ the judge deemed the third parties' view on where to place the company's COMI was as a very

⁵⁰ *Geveran Trading Co Limited v Skjevesland* (2003) B.C.C. 209

important issue in the case. In this previous case Registrar Jacques considered the part of “ascertainable to third parties” as paramount in determining the centre of main interests, on the basis that in case of insolvency, the creditors need to know how and above all where to contact the debtor⁵¹. Furthermore the most vital creditors to companies are generally their financiers and in the Daisytek case (as seen above) the financial functions were run out of the head office in Bradford, thus placing the “apparent COMI” - as far as the ones that had lent money to the Daisytek corporate group were concerned - in the UK.

Again, the Virgos-Schmit report was consulted by the judge in the Daisytek case and can here be seen to also supports this view:

“The rationale of this of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction [...] be based on a place known by the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.”⁵²

All these factors put together were considered to prove quite well that the foreign companies had their centre of main interests in the UK rather than where they were incorporated, thus rebutting the presumption in article 3(1). This lead to the conclusion that the English courts indeed had jurisdiction to issue the administration orders they did.

However the French courts did not entirely agree. The lower instance court⁵³ made a French administration order for the affected companies, thus ignoring the English decision and this also in disregard of recital 22 of the EC Regulation that states:

“The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court’s decision.”⁵⁴

⁵¹ *ibid* at 223A

⁵² Virgos-Schmit Report at para 75

⁵³ The Tribunal de Commerce of Sergy Pontoise

⁵⁴ EC Regulation 1346/2000 Recital 22

The proper way to deal with this situation (in hindsight) had been for the French companies to appeal the English administration order.⁵⁵

However, the case was consequently referred to the French court of appeal, Cour d'appelle du Versailles, which again analysed the case and deemed that the English High Court was in fact right, the French Tribunal de Commerce should not have made an administration order regarding ISA Daisytek SAS. Pursuant to articles 16 and 17 of the Regulation, the French courts should have immediately recognised the Leeds High Court's decision and this would have stopped them from opening main proceedings in France. The fact that the French Court of Appeal overturned the lower instance's decision was – in a way – a disappointment, as had they not, the question would most certainly have been referred to the European Court of Justice. This would have been advantageous mainly for the reason that the ECJ could have made a precedent that could have cleared up this uncertainty.

Even so, the case is interesting as it gives further support for the way of thinking applied in the BRAC case, since the courts here considered the same sort of factors and features as important, when analysing a company's COMI. Once again it was shown that a sufficient amount of evidence pointing in the right direction can rebut the presumption in article 3(1), but on an international, European level, we were no closer to solving the problematic lack of a definition than we were before. That however, may all be about to change.

4.2.3 Re: Eurofood IFSC Ltd⁵⁶

The most recent case covering this issue, concerns a company called Eurofood IFSC Ltd, based in Ireland and was a wholly owned subsidiary of an Italian company called Parmalat SpA (Parmalat). It was a large corporation that had subsidiaries in several countries. In late December 2003

⁵⁵ See Gabriel Moss, "The triumph of 'fraternité'" (2003) on www.iiglobal.org at p 2-3

⁵⁶ Re: Eurofood IFSC Ltd (2005) I.L.Pr 3

it became evident that the Italian parent had run into financial trouble it could not get out of on its own and on Christmas eve it was admitted to an Italian corporate rescue scheme⁵⁷. This rescue scheme had been passed into law by the parliament only the day before, December 23rd 2003 and sought to reorganise the Italian company, rather than winding it up.

In Ireland, the company Eurofood IFSC Ltd (Eurofood) was also in trouble. On January 27th its largest single creditor, Bank of America, petitioned to the Irish High Court for Eurofood to be wound up and for a provisional liquidator to be appointed, as they claimed the company to be insolvent. It seems there were fears that the Italian administrator, Dr Bondi, was trying to move Eurofood's COMI to Italy, by removing its directors and appointing new ones⁵⁸. A provisional liquidator was appointed by the Irish court and a date for the winding up hearing was set to February 23rd.

In Italy, Dr Enrico Bondi was on February 9th appointed extraordinary administrator of Eurofood by ministerial decree and four days later, gave the Irish company's liquidator notice that there would be a hearing to determine if Eurofood was insolvent, in Parma on the following Tuesday, February 17th. However, Eurofood's creditors were not informed of this meeting, and despite Eurofood's provisional administrator protests against the meeting, it was held in the Parma court three days later that the Irish company was insolvent, that the Italian hearing opened main insolvency proceedings and that its COMI was in Italy.

The Irish High Court did not hold its winding up hearing until March 2nd where it was held that main insolvency proceedings had in fact been opened in Ireland on January 27th (after carefully analysing several parts of the EC Regulation⁵⁹) and that Eurofood's COMI (based on the Regulation's

⁵⁷ Extraordinary administration procedures – called decree 347

⁵⁸ See David Baxter "COMI comes to Dublin" (2004) *Insol. Int.* 2004, 17(6), 92 at p 92

⁵⁹ Re: Eurofood IFSC Ltd (2005) *I.L.Pr* 3 at p 32

presumption and the COMI's determinability by third parties) "was at all relevant times"⁶⁰ in Ireland, not in Italy.

Dr Bondi later appealed this decision to the Irish Supreme Court on the grounds that since Eurofood IFSC Ltd was a wholly owned subsidiary of Parmalat, which controlled its policies completely, this should be enough to rebut the presumption in article 3(1) of the Regulation and so put Eurofood's COMI in Italy. The Supreme Court decided before giving judgment in the case, to refer a series of questions to the European Court of Justice, there among asking the ECJ what the deciding factors are when establishing a company's COMI.

It seems then that what our prayers for clarification, when it comes to the lack of a definition of the expression "centre of main interests", may very well be on the verge of being answered. In late May, 2004 these questions were referred to the ECJ, asking for guidance on how to interpret the Regulation in this very important part. It was received by the ECJ in August 2004⁶¹ and has joined the queue to be reviewed by the court. The Irish Supreme Court also sent a formal application for so-called accelerated procedure⁶² but the President of the ECJ, after establishing that the situation at hand was indeed within the scope of the Regulation, deemed that the existing circumstances did not amount to "a matter of exceptional urgency"⁶³. Hence, the request was rejected.

4.3 French Case-law

The Daisytek case mentioned above was also litigated in France with respect to the location of its COMI. However, I do not intend to review that case here as it is covered above and the French Court of Appeal overturned

⁶⁰ *ibid* at p 32

⁶¹ It has been given case no C-314/04

⁶² Rules of Procedure of the Court of Justice, article 104a, paragraph 1.

⁶³ Order of the President of the Court, case no C-314/04 1

the decision that the COMI was in France, perhaps a bit surprising, as the norm seems to be to give judgment in favour of your own compatriots.

4.3.1 Re: SAS Rover France⁶⁴

A recent and publicly well-known case is the MG Rover liquidation that started when the MG Rover Group in England opened its insolvency proceedings in Birmingham High Court in April of 2005, taking with it its subsidiaries in various countries across Europe, there among France.

The Birmingham Court concluded that the subsidiaries' COMIs should be considered located in the UK and that it therefore could act on behalf of the French company, when opening insolvency proceedings concerning it. The French public prosecutor however, did not agree and brought the case to the Commercial Court of Nanterre, stating a plethora of grounds why British Courts had no jurisdiction in this case.

In the end, the Nanterre Court found no rationale for the public prosecutors argument. As reasons for its judgment it took into consideration for instance the fact that it was publicly well known that the brand MG Rover is associated with English cars and therefore third parties would expect the company to conduct its business out of the UK, thus satisfying the "ascertainable by third parties" rule in recital 13. This was also strengthened by the circumstance that all orders for new cars were made on the company group's international IT network. The French public prosecutor had also submitted that it would be contrary to French public policy to accept the judgment of the Birmingham High Court. The Nanterre Court did not agree and referred to a decision in the ECJ⁶⁵ that stated that such refusal on the grounds of public policy would have to meet the criteria that recognition of the foreign judgment would be a breach of a fundamental national rule of law. This was not the situation at hand, concluded the court, and thus dismissed the intervention.

⁶⁴ [2005] EWHC 874 (Ch) (Unreported)

⁶⁵ Case C-7/98, *Krombach v Bamberski*

4.4 German Case-law

Also in Germany did the Daisytek insolvency spark up litigation concerning the German subsidiaries, but that case shall not be reviewed here as the main case and its circumstances are better covered by the UK court proceedings.

4.4.1 Zenith Maschinenfabrik Austria GmbH⁶⁶

An Austrian-based subsidiary to a German company called Zenith Maschinenfabrik GmbH, became insolvent and question arose when insolvency proceedings were opened in a German court, whether the subsidiary had its centre of main interest in Austria or in Germany. Deciding factors were that the Austrian company had no own management, its activities were completely sustained from its German parent, which it ostensibly also conducted its business solely for⁶⁷. These features made the Siegen District Court hold that the subsidiary had its COMI in Germany rather than in Austria.

Almost exactly the same took place a month later in the HUKLA-Werke case⁶⁸, where the facts considered and outcome of the case were exceptionally similar.

4.5 Common views of the courts

In the above reviewed case-law some common beliefs and ways of approach can be identified. Some of the cases are quite similar, in respect of both factual content and outcome.

In several cases, reference is made to the Virgos-Schmit Report as a reliable source of – at least – guidance. The courts that have used the report have

⁶⁶ Zenith Maschinenfabrik Austria GmbH File no 25 IN 154/04

⁶⁷ *ibid.* at p 1f

⁶⁸ HUKLA-Werke GmbH File no 2 IN 133/04

gone to some lengths to examine if the report in fact has any bearing on the present Regulation, and in every case decided that it is a relevant text. In most cases it has been paragraph 75 reviewed above, that has been referred to. Since many courts, as well as authors deem it appropriate to use as a tool, and no one has so far criticised its usage, the conclusion must be that the report still carries some weight with it.

Other features that have been credited as important similarly in several cases are factors of structure and command. In quite a few court proceedings reference is made to how decisions in the company are made and with what standards or laws contracts are governed⁶⁹. These characteristics obviously help to “assign nationality” so to speak to a company.

What’s more, one should not ignore the importance of other various facts that add to the amount of connections a company has to a certain state. In many – if not all – cases the court have used these circumstances to show that a company predominantly is closer to one country than the other. Examples of this can be seen in the Radoflex case, where it seems that the Swedish Court of Appeal finds that the connections to Sweden in the end out-weigh the ones to the state of incorporation. Also the Daisytek case presents a list of associations that turn out to be decisive and furthermore RIC 12/05 where one of the most important factors is that the Swedish limited partnership was the only source of income for the company in question. In many cases – it then would seem – it is by no means wrong to deliberate on all features and then take into account where a company has the largest amount of connections.

These similarities are by no means to be seen as a source of law, but more of a guide to show in which way the winds are blowing in courts across Europe.

⁶⁹ For instance in RIC 12/05, BRAC Rent-a-car, Daisytek and SAS Rover France

5 The ECJ

As mentioned above, a case has now made it as far as being referred to the European Court of Justice, something many have been waiting for. The Eurofood case (described in 4.2.3) will hopefully, once settled, give new and much needed guidance in the matter of defining the ‘centre of main interests’ and further clarify the Regulation and its employment. The Irish Supreme Court referred five questions to the ECJ for a preliminary ruling before they could themselves decide the case appealed to the Irish Court by Dr Bondi, the Italian extraordinary administrator. Of the questions referred, the one that is of the greatest interest within the scope of this essay, is the fourth question, that asks what the deciding factors, when deciding a company’s COMI in a cross-border insolvency as the one now at hand, are. The question reads:

“Where,

- a) the registered offices of a parent company and its subsidiary are in two different member states,
- b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated and,
- c) the parent company is in a position, by virtue of its shareholding, and power to appoint directors, to control and does in fact control the policy of the subsidiary,

in determining the ‘centre of main interests’, are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?”

The Court was due to give its judgment in December 2005.

It may be worth mentioning as a side-note, that the ECJ very recently gave judgment in another case concerning the EIR’s article 3(1) that is closely

related⁷⁰. In this Germany-based case, it was held that the proper time to define in what country the company's COMI is located, is at the point when the request to commence insolvency proceedings is lodged with a court.

5.1 The view of the Advocate General

The Advocate General's opinion precedes the court's ruling and while by no means binding, it is non-the less extremely persuasive and in many cases followed by the Court in its later decision. Therefore the opinion of the Advocate General Jacobs (in this case) is very interesting and significant.

In his opinion on case C-341/04 he starts out by describing the history and facts of the case and interestingly enough also makes a reference to the Virgos-Schmit Report, which he says "may provide useful guidance when interpreting the Regulation"⁷¹ and gives further credibility to it by giving examples of more situations where a similar course of action has been taken⁷². Further on Jacobs goes through Dr Bondi's appeal and the specific questions that the Irish Supreme Court subsequently referred to the ECJ, while also mentioning written observations that have been handed in to the Court in reference to this case.

Finally the Advocate General then goes on to discuss the questions that the Court have been asked to answer, and examines them at length. The forth question gets a fair amount of attention and Jacobs first describes the relevant article plus recital and then considers Dr Bondi's argument and views. On quite a few points the Advocate General agrees with Dr Bondi but deem many of his grounds as immaterial in the present case and therefore not helpful when trying to answer the question that the Irish Supreme Court has referred. Jacobs states that he does not support the view that the mere fact that Eurofood's parent, Parmalat, wholly owns it and also

⁷⁰ Case C-1/04 Staubitz-Schreiber

⁷¹ Case C-341/04 Eurofood IFSC Ltd, Opinion of Advocate General Jacobs delivered on 27 September 2005, at para 2

⁷² *ibid.* in foot-note 6

controls its actions and policies is enough to rebut the presumption in article 3(1) of the Regulation⁷³. He articulates that the Regulation does not infer anything from the fact that a company is a subsidiary to a parent company – thus adhering to the principle of separate legal personality – and therefore the EIR applies to all separate companies as individuals. The fact that the parent controls Eurofood in the way it does does therefore not mean that Eurofood’s administration is located with the parent. He also considers it important to determine where the subsidiary ‘conducts the administration of its interests on a regular basis in a manner ascertainable by third parties’ as this can in extreme situations, where the control is total and this is evident and obvious to third parties, lead to a state of affairs where the subsidiary’s administration may be considered to be with the parent⁷⁴. In this case however, the facts do not support this view. In closing regarding this question, the Advocate General comments that when locating a company’s COMI the situations and facts are often so individual and different that previous decisions by national courts should not be attempted to help form a general rule.

This is also the part in which one may criticise Jacobs’ opinion. All the interested parties that have been following this case have waited for the ECJ to take the opportunity to lay down guide lines on how to use the expression COMI correctly. In the Advocate General’s suggested judgment there are no definite rules of general application to be found and furthermore he implies that previous national cases should not be considered to be of much help in constructing a universal policy on the matter⁷⁵. Hence one might say that this has not moved us any closer to a clarification at all but rather put us at a stand still which is unfortunate, to say the least. In roughly 75 per cent of the cases the ECJ handles the court follows the opinion handed down by the Advocate General⁷⁶ with little or no amendments. In the present situation it would be preferable for the court to instead take the time to form a set of

⁷³ *ibid.* at para 120

⁷⁴ *ibid.* at para 126

⁷⁵ *ibid.* at para 125

⁷⁶ “Eurofood IFSC Limited: The EC Insolvency Regulation revisited” at p 3

universal rules which can clear up the uncertainty that clouds this issue. The Court was due to deliver its judgment in December but has up to this date not yet done so, giving some hope that the final judgment may still contain a more complete set of guide lines.

5.2 The Court

What now is left in the Eurofood case is for the ECJ in itself to consider it and give its judgment. As mentioned above the court was due to publish its findings in December 2005, but has not yet done so. This is unfortunate, as this essay surely would have benefited from also being able to take into account the final ruling, but as the decision seems to linger it was just not possible to wait for it.

The Advocate General's opinion does indeed give us some insight into how the court will most likely decide the case, but as the opinion does not provide any guidelines of general application in the area this essay tries to cover, it is of little value to anyone wanting to learn more about the detailed application of the phrase COMI. A possible reason for the delay in the final judgment is that the court is taking the time to construct these rules and a definition of the locution, in order to provide some clarification to the rather new area of cross-border insolvency law. Should this be the case then it will surely be worth the wait, as greater predictability in the application of the Regulation is definitely desirable.

It would seem strange if the Court did not take the opportunity to clear up these matters by finally properly define "centre of main interests". This would most certainly limit the amount of cases where we suffer lengthy litigation and great uncertainty.

6 Conclusion

When the EC Regulation 1346/2000 came into force, there was no real definition or case law on the expression “centre of main interests”. This was unfortunate since it is a very important part of the Regulation and will most probably be used often in the future, as cross-border companies grow in number all the time and ever so often are forced to recognise the fact that they are insolvent. As the situation is today, there is some room for own interpretation on exactly what one should take into account when deciding what constitutes the *centre of main interests* and it needs to be cleared up by higher authority to avoid expensive and time-consuming litigation in the future.

There have been attempts at interpreting this expression by some courts and the cases that have been decided so far all point in the same *basic* direction when it comes to what factors are important when trying to establish the location of a company’s COMI. However, as already mentioned, these cases do not in any way bind courts in other Member States. Only the ECJ can accomplish that⁷⁷.

Moreover, another issue that is not very clear is the applicability of the Virgos-Schmit Report, which does offer some guidance when analysing the Regulation. As it was written as a report on the Convention on Insolvency Proceedings (which never came into force), its authority is officially uncertain although the Regulation takes many phrasings straight out of the old Convention and it has been subject to many referrals by courts. A number of legal authors have also given the report their support, but in regard of article 3(1) here in question, it can also be said to be a bit diluted.

The one thing that could settle all this and end the uncertainty around this problem is the forthcoming judgment from the ECJ, the European Court of

⁷⁷ EC Treaty art 234

Justice. The Eurofoods case that was referred there last autumn was denied being “fast-tracked” and has therefore taken quite some time to reach the court itself and the General Advocate that gave his opinion in September 2005 chose not to provide any satisfactory rules of general application. However, it will be interesting to see what stance the ECJ takes when its decision does come.

Even so, in lack of a properly defined COMI, insolvencies across Europe may well spark up more litigation as we wait for the decisive judgment. It will hopefully – when it arrives sometime in the not-to-distant future – clear up most of the obscurities surrounding this topic and bring predictability and transparency to the European Insolvency legislation, as well as insolvency law-related ‘peace in our time’. We can only wait and see.

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