DOES THE COMI ENSURE LEGAL CERTAINTY OF GROUP INSOLVENCY IN THE EU?*

Ekaterina Markova[1]

Many corporations are structured as groups of companies. However, the Insolvency Regulation and its Recast version do not contain any special provisions on determination of the COMI (the centre of the main interest) in case of group insolvency. This raises some problems in determination jurisdiction in insolvency proceedings. This paper will reveal strengths and weaknesses of the current approach to the COMI and also will address possible changes in European case law stemming from the recasting of the Insolvency Regulation.

1. Introduction

The need for regulating insolvency at EU level can be traced back to the tendency that activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by EU law. Since the insolvency of such undertakings also affects the proper functioning of the internal market,[2] there is a need for an EU act requiring coordination of the measures to be taken regarding an insolvent debtor's assets. Council Regulation (EC) No 1346/2000 (here in after Insolvency Regulation 2000) and its recast version Regulation (EU) No. 2015/848 (hereinafter Insolvency Regulation 2015) established that *"the courts of the Member States within the territory of which the centre of the debtor's main interests (or simply COMI) is situated shall have jurisdiction to open insolvency proceedings".*[3] However, there are no specific provisions on establishing the COMI of groups of companies in the Regulation. The question is whether the current legal framework and case-law has clear and unambiguous rules on insolvency proceedings in case of corporate insolvency.

2. Concept of the COMI

The Insolvency Regulation 2000 describes the COMI as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties (Insolvency Regulation 2000, Recital 13). This concept includes three elements. First, the COMI is a place where the debtor conducts the

* DOI 10.21868/PGnG.2018.1.6.

[1]*Ekaterina Markova,* LL.M Student, Faculty of Law, University of Debrecen.

[2]According to a calculation based on an impact assessment study of the European Commission covering a time span between 2005 to 2015, the (average) rate of cross-border insolvency proceedings is approximately 4 % in the total number of insolvency proceedings (i.e. cross-border + domestic insolvency proceeding altogether) at EU level. [For the results of the study, see European Commission (2017) Impact assessment study on policy options for a new initiative on minimum standards insolvency and restructuring law – Final Report. Luxembourg: Publications Office of the European Union]

[3] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, Recital 13: Regulation (EU) No. 2015/848of 20 May 2015 on insolvency proceedings. OJ L 141., 2015, Recital 23.

administration of its interests. Second, the conduct should be on the regular basis. Third, the COMI should be ascertainable by third parties.[4]

The term "*place where the debtor conducts the administration"* is a wide concept, which may include different activities related to the business, for instance, the place where the business actually operates and has its employees, the place where the board of directors of the company meets, the place where strategic decisions of the company are made.[5]Following this logic, the subsidiary which is wholly owned by the parent company and does not decide independently upon its own conduct on the market may have its COMI in the jurisdiction of its parent company.

The Regulation does not explain which activity is a major definitive factor and does not imply the weighting of each factor. There maybe situations when the meetings of the board and operating business are located in different places; the Regulation only suggests that the registered office shall be presumed to be the COMI in the absence of proof to contrary.[6] At the same time, the Court of Justice of the European Union (hereinafter the CJEU, or the Court) established that all of these factors are not sufficient to rebut the presumption. Instead, the Court preferred to consider the registration as a reliable factor that ensures legal certainty which is contrary to the idea that the COMI has to be in a jurisdiction that has major links with the company's business.

3. The Eurofood case

In the *Eurofood* case the policy of the Irish subsidiary wholly owned by an Italian parent company was determined by the parent's headquarters. Also the subsidiary had no employees in Ireland. The only function of the subsidiary was carrying out financial transactions for the parent company. The CJEU ruled that, first, the COMI should be determined for each distinct legal entity,[7] and second, "*the mere fact that the economic choices are […] controlled by parent company is not enough to rebut the presumption"*.[8] The same logic was used in the *Interedil* case, where the CJEU confirmed the impossibility to rebut the presumption unless all relevant factors make it possible to establish the COMI in a manner ascertainable by third parties.[9] Although this decision opened the possibility to overcome the presumption, the standards of proof remained high, which makes it hard to rebut.

The third criterion is that the COMI shall be ascertainable for third parties or can be observable. The logical question is who these third parties are. In the *Eurofood* case the CJEU defended the position of creditors. However, the insolvency proceeding is open on a request of an applicant while there is no full list of creditors. Therefore, it is

[4]Bachner, T. (2006). The Battle Over Jurisdiction in European Insolvency Law. *European Company and Financial Review* 3(3): 71.

[5]Wautelet, P. (2007). Some Considerations on the Centre of Main Interests as Jurisdictional Test Under the European Insolvency Regulation. In, Affaki G. (Ed.), *Cross-Border Insolvency and Conflict of Jurisdiction: A US-EU Experience*, Bruxells: Bruylant., 73-76.

[6] Council regulation (EC) No 1346/2000, Article 3 Para.1.

[7] Case C-341/04, Eurofood IFSC Ltd, European Court Reports 2006 I-03813, Para. 30

[8]Eurofood, Para. 36.

[9]Case C-396/09, Interedil Srl, in liquidation v. Fallimen to Interedil Srl and Intesa Gestione Crediti SpA, 20 October 2011, ECR 2011 I-09915, Para. 59.

impossible to establish whether the COMI was ascertainable for all creditors at the time when the court must decide on its jurisdiction. This criterion is subjective and depends on the particular creditor who requested for insolvency. In most cases only the applicant participates in the hearing on opening the insolvency proceedings, therefore other creditors cannot object to his evidence. Also, such a key notion as "presumption" may have various meanings to lawyers from different legal systems within the Union. For example, some courts will assume their jurisdiction unless somebody rebuts the presumption,[10] therefore they will not examine the ascertainment for third parties. Therefore, the reliance on this criterion does not lead to actual legal certainty. Unfortunately, in the *Eurofood* case the CJEU based its argumentation exactly on the subjective third criterion of the COMI.[11]

Without a doubt, the registered office is more ascertainable for third parties.[12] But it appears that the rationale of choosing the registration office as the place of COMI in most cases is the following. In all insolvency cases one particular creditor, namely the national tax authority will always defend that presumption, because it may have priority in creditor ranking in its own country, sufficient infrastructure to participate in insolvency etc. The desire to make insolvency proceedings subjected to corporate law and tax law was demonstrated many years ago in the *Daily Mail* case.[13] As a consequence, following the *Centros* case logic[14] the CJEU only agreed that in the case of a 'letterbox' company, the COMI cannot be situated where the registered office is.[15]

Eurofood company made three transactions with the applicant, and two of them were secured by the parent company.[16] Therefore, the counterparty in these transactions, or creditors, could have assumed the operation of the subsidiary is conducted in a different member state. The principle of the *"COMI ascertainable for third parties"* may become the instrument to choose preferable jurisdiction for creditors.

It is important to note that some scholars interpret the third criterion as a consequence of conducting administration of interests on regular basis and, thus, as a non-independent criterion.[17] Indeed, the wording of Recital 13 allows interpreting in such a way. And some courts diverge from the position of the CJEU by explaining all links between the company and the jurisdiction other than where the registered office is located.[18] This divergence decreases legal certainty in insolvency proceedings.

[10]Bachner2006: 324.
[11]Eurofood, Para. 33.
[12]Almaskari, B. J. (2016). *Towards Legal Certainty: European Cross Border Insolvency Law and Multinational Corporate Groups*, Thesis submitted for the degree of Doctor of Philosophy, University of Leicester, 85.
[13] Case 81/87, The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, ECR 1988 -05483, Para. 20.
[14]C-212/97, Centros Ltd v Erhvervs- ogSelskabsstyrelsen, ECR 1999 I-01459, Para. 39.
[15]*Eurofood*, Para. 35.
[16]Opinion of Advocate General Jacobs, delivered on 27 September 2005, Case C-341/04, Paras. 28-29.
[17]Wessels, B. (2012*). International Insolvency Law*, Third Edition, Deventer: Kluwer, 456.
[18]Kycia, K. & Dec, M. (2015).*Global Insights: Practical Problems in the Cross-Border Insolvency of a Subsidiary in Poland*. Available at: http://www.insol.org/emailer/May_2015_downloads/Document%2015.pdf [accessed April 29, 2018]

It is obvious that in *Eurofood* the CJEU refused to link the parent company and the subsidiary. At the same time, the CJEU established the possibility of treating the corporate group as 'a single economic union' in other cases considering tax issues and competition law.[19]This may cause particular problems. For example, if the parent company and its subsidiary were held liable as a single union and both of them claimed insolvency, how will the liability be divided between two proceedings?

4. The new EU Insolvency Regulation of 2015

The recast EU Insolvency Regulation 2015 confirms all the three criteria developed in the CJEU case-law. More than that, it confirms the importance of the test that the COMI shall be ascertainable by third parties supporting the approach seen in *Eurofoodas an independent criterion (Article 3(1))*.

On the other hand, it states that *"rules on the insolvency proceedings should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the COMI of those companies is located in a single Member State",* but specific rules regarding the COMI for a group of enterprises were still not introduced. Will the CJEU find more possibilities in this Recital to deviate from the strong presumption established by the CJEU? Or is this a reference to a 'letterbox' parent company? What is more important, will there be any guidelines how to establish whether the COMI was ascertainable for third parties and who shall be counted as a third party under the Insolvency Regulation 2015?

The Insolvency Regulation 2015 came into force in 2017, therefore now we do not have a sufficient number of cases before the CJEU to analyse if there are any changes in the Court's approach due to the Recast version. Till then, the possibility that an applicantwillchoosepreferablejurisdictionremains.

List of references:

- Almaskari, B. J. (2016). *Towards Legal Certainty: European CrossBorder Insolvency Law and Multinational Corporate Groups*, Thesis submitted for the degree of Doctor of Philosophy, University of Leicester.
- Bachner, T. (2006). The Battle Over Jurisdiction in European Insolvency Law. *European Company and Financial Review* 3 (3): 310-329.
- Creditreform Economic Research Unit (2018) *2017/18*. Neuss/Vienna: Verband der Vereine Creditreform. Availableat https://www.creditreform.cz/en/press-and-downloads/development-of-insolvencies-in-europe.html [accessed June 29, 2018]

[19]Case C-97/08, Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV, Akzo Nobel Functional Chemicals BV v Commission of the European Communities, OJ C 267, 7.11.2009, Paras. 60-61.

- European Commission (2017). *Impact assessment study on policy options for a new initiative on minimum standards insolvency and restructuring law – Final Report.*Luxembourg: Publications Office of the European Union. Available at: https://publications.europa.eu/en/publication-detail/-/publication/2bb5fd98-6065-11e7-954d-01aa75ed71a1/language-en [accessed 29 June, 2018]
- Wautelet, P.(2007). Some Considerations on the Centre of Main Interests as Jurisdictional Test Under the European Insolvency Regulation. In, Affaki G. (Ed.), *Cross-Border Insolvency and Conflict of Jurisdiction: A US-EU Experience*, Bruxells: Bruylant.
- Wessels, B. (2012). *International Insolvency Law*, Third Edition, Deventer: Kluwer.
- Kycia, K. & Dec, M. (2015). *Global Insights: Practical Problems in the Cross-Border Insolvency of a Subsidiary in Poland*. Available at: http://www.insol.org/emailer/May_2015_downloads/Document%2015.pdf [accessed 29 April, 2018]

- Case C-341/04, Eurofood IFSC Ltd, European Court Reports 2006 I-03813
- Case C-97/08, *Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV, Akzo Nobel Functional Chemicals BV v Commission of the European Communities, OJ C 267, 7.11.2009,*
- Case C-396/09, Interedil Srl (in liquidation) v. Fallimen to Interedil Srl and Intesa Gestione Crediti SpA, 20 October 2011, ECR 2011 I-09915
- Case 81/87, The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, ECR 1988-05483
- Council Regulation (EC) No 1346/2000 of 29 May 2000
- Regulation (EU) No. 2015/848 of 20 May 2015

.