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# The Changing Landscape of Cross-border Insolvency Law in Europe

## 1. Introduction

The 21<sup>st</sup> century has started with several legislative measures of importance for insolvencies with a cross-border effect. In 2000, birth was given to the EU Insolvency Regulation (No. 1346/2000), which entered into force on 31 May 2002 (InsReg). For several financial institutions falling outside the regulation's scope, 2001 produced Directive 2001/17 and Directive 2001/24, on the reorganisation and winding up of insurance undertakings and of credit institutions. Where a 'Regulation' is a European Community legislative measure that is fully binding for the EU Member States (except for Denmark), both directives have to go through a legislative implementation process in each individual EEA (European Economic Area) member state. The implementation date for Directive 2001/24 was 20 April 2003 and for Directive 2001/17 — 5 May 2004, and the drafting process in all countries is nearing its final phase.

In this article, I would like to describe where Europe stands (as of May 2006). On the European level a regulation has been introduced that is based on well-known theories of private international law for dealing with cross-border insolvencies (see section 2 of the paper). This regulation is referred to as the EU Insolvency Regulation (see section 3), and the basis it provides for a court to exercise international jurisdiction to initiate insolvency proceedings ('centre of main interests') is discussed in section 4, with an examination of two cases of the European Court of Justice (of 17 January 2006 and 2 May 2006) in sections 5 and 6. The EU Insolvency Regulation carries its own legal concept (addressed in section 7). The regulation should be seen in its procedural context, as it fills the gap that had been left open by the introduction of the 1968 Brussels Convention, dealing with the international jurisdiction and recognition of judgments in civil and commercial matters. In the context of legal proceedings, the latter (known as the Brussels Regulation 2000 in its current form) constitutes the general rule, while the regulation (for insolvency judgments) itself forms the special rule. As 'financial institutions' are not covered by the Insolvency Regulation, the latter serves in its turn as a general rule with regard to credit institutions and insurance undertakings, for which the entities directives 2001/17 and 2001/24 have been issued (see section 8). The article ends with a short conclusion.

## 2. Co-ordinated universality as basic model

“The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor’s assets”, according to Recital 3 of the Insolvency Regulation. So, what is the chosen approach to achieve proper functioning of the internal EU market when confronted with cross-border insolvency cases? These cases include instances where the insolvent debtor has assets in more than one member state or where some of the creditors of the debtor are not from the state in which the insolvency proceedings are taking place. These instances give rise to a great number of sometimes rather complex legal questions, such as that of the international jurisdiction of the court that is authorised to commence insolvency proceedings; the law applicable to the insolvency proceedings; the substantive and procedural effects of these proceedings, e.g., on the legal position of creditors from abroad and their rights to set-off or the termination of employment contracts; the issue of recognition of proceedings that have been initiated abroad; and the powers of a liquidator or administrator who has been appointed abroad. To strike at their heart, the issues to be resolved concerning cross-border insolvencies are being approached from two points of departure: ‘universality’ and ‘territoriality’.

In the universality model, insolvency proceedings are seen as unique proceedings reflecting the unity of the estate of the debtor. The proceedings should involve all of the debtor’s assets, wherever in the world these assets are located. Under this approach, the whole estate will be administered and reorganised or liquidated on the basis of the rules established in the law of the country where the debtor has his domicile (or registered office or similar reference location) and in which country the proceedings have been opened. The applicable law for the proceedings and its legal and procedural consequences is the law of the state in which the insolvency measures have been undertaken. This law is referred to as *lex concursus* or *lex forum concursus* (‘forum law’), being the law (*lex*) of the country where a court (*forum*) has opened insolvency proceeding (dealing with concurrent claims of creditors: *concursum*) and which court is (or has been) charged with hearing, conduct, and closure of the proceedings. The liquidator (or administrator) in this approach is charged with the liquidation (or reorganisation) of the debtor’s assets anywhere in the world of which the debtor himself (partly) has been divested; respectively, he is charged with the supervision of the administration of the debtor’s affairs. The *lex concursus* determines all consequences of these proceedings, e.g., with regard to current contracts, the powers of an administrator, and the bases and system for distributing dividends to creditors.

The territoriality model, on the other hand, takes as a basic idea that the insolvency measure under consideration will have legal effects only within the jurisdiction of the state within the territory of which a court has opened said insolvency proceedings. The legal effects of these proceedings therefore will stop abruptly at this state’s borders. The limitations these proceedings will bring to a debtor’s legal authority to administer his assets are not applicable abroad. Assets in other countries are not affected by these proceedings, and the administrator who is appointed will not have any powers abroad.

These points of departure form both endpoints of a continuum and are discussed extensively and sometimes sharply in the literature.<sup>1</sup> In practice, most countries modify or limit the sharp edges of these theories and have introduced modified or mixed models, mostly referred to as ‘modified’, ‘limited’, or ‘mitigated’ universalism, as most of them at their core have a universality element. The EU Insolvency Regulation is based on a mixed model, referred to by me as ‘co-ordinated’ universality.<sup>2</sup>

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<sup>1</sup> See B. Wessels. International Insolvency Law. Deventer: Kluwer 2006. See also, e.g., S. Kolmann. Kooperationsmodelle im Internationalen Insolvenzrecht. Empfiehlt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung (Models of Cooperation in International Insolvency Law; Is a New Orientation to be Recommended for German International Insolvency Law)? Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht. Bielefeld: Verlag Ernst und Werner Giesecking 2001; J. Westbrook. The Control of Wealth in Bankruptcy. – Texas Law Review 2004 (82) 4, p. 795; J. Pottow. Procedural Incrementalism. A Model For International Bankruptcy. January 2005, Paper#05-001. Available at [www.law.umich.edu](http://www.law.umich.edu).

<sup>2</sup> Co-ordination is to be found especially in the mutual duties for liquidators in insolvency proceedings, pending in different EU Member States, to communicate information and to co-operate, see article 31 InsReg. See my editorial ‘It’s Time to Cooperate’. – International Corporate Rescue 2005/2, pp. 291ff.

### 3. The EU Insolvency Regulation

On 31 May 2002, Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings entered into force. The regulation applied entirely and directly to the ten Member States that joined the EU as of 1 May 2004.<sup>\*3</sup> A regulation is a European Community measure of law that is binding and directly applicable in Member States.<sup>\*4</sup> The regulation does not apply to Denmark, as it opted out in accordance with the Treaty of Amsterdam.

In the light of the introduction above, it should be mentioned that the regulation acknowledges the fact that, as a result of widely differing substantive laws in the Member States, “it is not practical to introduce insolvency proceedings with universal scope in the entire Community” (Recital 11). The differences mainly lie in the widely differing laws on security interests to be found in the Community and the very different preferential rights enjoyed by some creditors in the insolvency proceedings.

The goals of the regulation, with 47 articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for co-ordination of the measures to be taken with regard to the debtor’s assets, and to avoid ‘forum shopping’. The regulation, therefore, provides rules for the international jurisdiction of courts in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States, and the powers of the ‘liquidator’ in the other Member States. The regulation also deals with important choice of law (or private international law) provisions. These contain special rules on applicable law in the case of particularly significant rights and legal relationships (e.g., rights *in rem* and contracts of employment). On the other hand, national proceedings covering only assets situated in the state of opening are allowed alongside ‘main’ insolvency proceedings with universal scope. The material that follows provides a quick summary of the contents of the Insolvency Regulation.

The general provisions establish the area of application of the regulation. It is confined to “proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator” (see article 1 (1) InsReg). Annex A addresses all insolvency proceedings of the Member States; Annex C mentions all names of the officeholders (‘liquidators’). As far as the courts’ jurisdiction is concerned, the regulation is based on the general principle that “the courts of the Member State within the territory of which the centre of the debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings” (see article 3 (1)). For a company or legal person, the presumption is that the centre of the debtor’s main interests is the place of his registered office, but this presumption may be rebutted (article 3 (1), final line). Debate as to whether a debtor (natural persons and legal persons, except financial institutions) indeed has his centre of main interests (in Estonian: *võlgniku põhihuvide kese*; in international jargon: COMI) in a certain jurisdiction has been heard in some 70 courts in 10-odd countries since May 2002.

The insolvency proceedings opened are referred to as ‘main’ proceedings. Their most important consequence is that the law applicable to insolvency proceedings under the regulation is that “of the Member State within the territory of which such proceedings are opened” (see article 4 (1)), thus *lex concursus*, and that the proceedings opened shall be recognised automatically in all other Member States (article 16). In addition, the court of another Member State than the State of opening of main proceedings shall have jurisdiction only if “the debtor possesses an establishment within the territory of that other Member State” (article 3 (2)).<sup>\*5</sup> The effects of the latter proceedings — referred to as secondary proceedings — are, however, restricted to the assets of the debtor situated in the territory of the other Member State (article 3 (2), last line) and the latter proceedings may consist of winding-up proceedings only. In the framework of main proceedings and secondary proceedings one notes a combination of universality and territoriality, as referred to above.

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, as Recital 13 provides. In some 80 per cent of all court cases published mid-2002<sup>\*6</sup>, the determination of COMI is the principle point of legal conflict, with highly contested cases like those of Daisytex (involving 16 subsidiaries, in the UK, Germany, and France)<sup>\*7</sup> and Parmalat (involving Italy, Ireland, the Netherlands, and Luxembourg). The resolution of the

<sup>3</sup> Some smaller changes have been made, based on the accession of ten States to the EU, based on article 20 of the Act of Accession (OJ L 236, 23.09.2003, Annex II, paragraph 18, A(1)), and after the accession of Bulgaria and Romania as per 1 January 2007 (OJ L 363, 20.12.2006). In the consolidated version of the Insolvency Regulation also amendments to the Annexes (April 2005, May 2006 and December 2007) have been inserted. For the most recent version visit my weblog (2007-01-doc16) at [www.bobwessels.nl](http://www.bobwessels.nl).

<sup>4</sup> A Regulation does not allow ‘implementation’ as it binds Member States directly. In several countries though, national legislation is (or should be) adopted in order to make the Insolvency Regulation compatible with national procedural law, see for Germany, France and the Netherlands: B. Wessels. Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands. – Current Topics of International Insolvency Law, Kluwer, 2004, p. 229.

<sup>5</sup> Article 2 (h) provides that for the purposes of the EU Insolvency Regulation an ‘establishment’ (in Estonian: *tegevuskoh*) shall mean ‘any place of operations where the debtor carries out a non-transitory economic activity with human means and goods’.

<sup>6</sup> Sources or extracts of nearly 200 court cases (as per August 2007) can be found at [www.eir-database.com](http://www.eir-database.com).

<sup>7</sup> These European subsidiaries were left out of a filing of a Chapter 11 case in the USA (Dallas, Texas) for the overall holding of Daisytex International, Inc.

question ‘where is the centre of main interests?’ in these decisions is based on many facts and circumstances. Amongst (very many) others, facts deemed relevant in one or another case include that:

- (i) the day to day administration was conducted in the forum state (Ireland)\*<sup>8</sup>;
- (ii) the directors possessed the forum’s state’s nationality (Italy)\*<sup>9</sup>;
- (iii) the (Delaware-incorporated) company had represented itself to its most substantial creditor as having its principle executive offices in the forum state (England)\*<sup>10</sup>;
- (iv) the debtor (a natural person) maintained, with regard to the substantial interests in a large number of companies established in the forum state, that he administered these commercial interests in the forum state (the Netherlands)\*<sup>11</sup>;
- (v) the director (of an Irish-incorporated company that was a wholly owned subsidiary of a UK company) was based in the UK and was solely responsible for the company’s business\*<sup>12</sup>;
- (vi) some remaining contractual work (conducted by a company incorporated in Finland) was still in progress in the forum state (Sweden)\*<sup>13</sup>;
- (vii) the parent company (of an Austrian company with its domicile in Innsbruck) was located in the forum state (Germany)\*<sup>14</sup>;
- (viii) the company (registered in the UK, with a postal address in Spain) was a partner in a Swedish limited partnership (*kommanditbolag*) (Sweden)\*<sup>15</sup>; and even
- (ix) the source code of the computer programs of the debtor company (registered in the UK, postal address in the UK, premises in Sweden) was stored in the forum State (Sweden).\*<sup>16</sup>

The regulation provides for several exceptions to application of the *lex concursus* (see articles 5–15, InsReg). These exceptions include third parties’ rights *in rem* and reservation of title (articles 5 and 7) and set-off rights (article 6). These rights (under certain conditions) are not affected by the legal consequences (*lex concursus*) of the commencement of main proceedings. In other instances, an exclusion is applied in that another choice of law (instead of the *lex concursus*) is made. Important examples are contracts relating to immovable property (article 8: effects of insolvency proceedings shall be governed by the law of the Member State within the territory of which the immovable property is situated) and contracts of employment (article 10 states that this is governed by the law of the Member State applicable with respect to the contract of employment).

Insolvency proceedings begun in the opening state where the debtor has his centre of main interests will be (automatically, per article 16) recognised in all other Member States. Nevertheless, such recognition does not prohibit the undertaking of secondary proceedings in a state where the debtor owns an establishment (article 16 (2)). Furthermore, the regulation describes, amongst other elements, the powers of a liquidator and the publication of the opening judgment in another Member State or in public registers. Any creditor has the right to lodge claims in writing if his residence is located in a Member State other than the state of the opening of proceedings. This provision is meant also to concern the tax authorities and social security authorities (article 39).\*<sup>17</sup> The regulation further provides for a duty to inform known creditors in the other Member State and the language to be used in the specific notice.

In general, the EU Insolvency Regulation applies only to intra-Community relations; in cross-border insolvency cases relating to non-EU states, the rules of general private international law or specific legislation of a particular country in this field apply.\*<sup>18</sup>

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<sup>8</sup> Court of Dublin, 23 March 2004 (Re Eurofood IFSC Limited) (Irish company, part of the Parmalat group).

<sup>9</sup> Court of Parma, 19 February 2004 (Re Eurofood IFSC Limited).

<sup>10</sup> Court of Leeds (Ch. D), 20 May 2004 (Re Ci4net.com Inc and Re DBP Holdings Limited).

<sup>11</sup> Netherlands Supreme Court, 9 January 2004. – JOR 2004/87, which includes my commentary.

<sup>12</sup> High Court London (Ch. D), 2 July 2004 (Re Aim Underwriting Agencies (Ireland) Ltd).

<sup>13</sup> Svea Court of Appeal, 30 May 2003, No. Ö 4105-03 (on file with author).

<sup>14</sup> Court of Munich, 4 May 2004 (Re Hettlage KgaA).

<sup>15</sup> Court of Appeal Skåne and Blekinge, 3 February 2005, Ö 21-05.

<sup>16</sup> Court of Stockholm, 21 January 2005, K 17664-04.

<sup>17</sup> High Court of Ireland, 8 March 2005 (Re Cedarlease Ltd) considers that the Insolvency Regulation does not expressly provide that a creditor located in another Member State (i.e., the Commissioners of Customs & Excise for the UK) shall have the right to initiate insolvency proceedings, but in the court’s view, it would defeat the purpose of the Insolvency Regulation if that were not the case.

<sup>18</sup> See V. Marquette, C. Barbé. Council Regulation (EC) No. 1346/2000. Insolvency Proceedings In Europe and Third Countries. Status and Prospects. – A. Nuyts, N. Watté (eds.). International Civil Litigation in Europe and Relations with Third States. Bruxelles: Bruylants 2005, p.419.

## 4. How to determine COMI

It may follow from the above that courts make their determination on COMI following the interpretation of a superabundance of facts.<sup>\*19</sup> In general, I would submit, in these court cases one sees the clash of two concepts. The first is a ‘contact with creditors’ (sometimes: ‘business activity’) approach: a debtor’s COMI has to be determined through the eyes of creditors. After all, Recital 13 provides that COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis “**and is therefore ascertainable by third parties**” (my emphasis).

A simple example is the case decided by the District Court Dordrecht (in the Netherlands) on 23 November 2005 (LJN: AU7353). A creditor filed for insolvency proceedings concerning a debtor on 13 September 2005. The request was dealt with by the court on 23 November 2005. The debtor, though appropriately summoned, did not appear. The court based its international jurisdiction on article 3 (1) in the light of Recital 13. Public municipal records indicate that the debtor — prior to the date of filing, 4 May 2005 — had left for Belgium. Therefore, according to the court, Belgium is the debtor’s COMI unless it is proved that his COMI is in the Netherlands. It is not enough that the debtor’s small business registration in the Trade Register was cancelled on 11 October 2005, *ex officio* by the keeper of the register. It has not been proved that the debtor still continues to display activities, and the fact that he still has several debts to the filing creditor is insufficient for assuming that his COMI is in the Netherlands. Therefore, the Dutch courts do not have jurisdiction to open main insolvency proceedings.

The other view is the ‘mind of management’ approach (sometimes called the ‘headquarters’, ‘head office functions’, or ‘parental control’ approach). An example can be found in a case of the UK High Court of Justice (Chancery Division Companies Court) ruling of 15 July 2005 (Collins & Aikman Europe SA).<sup>\*20</sup> In the UK, an application for administration orders was made concerning 24 companies in the Collins & Aikman Corporation Group, of which one was incorporated in Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden, three in Italy, one in Belgium, four in the Netherlands, and one in the Czech Republic. The Collins & Aikman Group had its headquarters in Michigan, USA. A leading global supplier of automotive component systems and modules to the world’s largest vehicle manufacturers, including Daimler, Ford, General Motors, Honda, Nissan, Porsche, Renault, Toyota, and Volkswagen, it had a combined workforce of approximately 23,000 employees and a network of more than 100 technical centres, sales offices, and manufacturing sites, in 17 countries throughout the world. In Europe its 24 facilities spanned ten countries, with 4500 staff. Its largest customers were Daimler, Daimler Chrysler, General Motors, and Ford, with Ford accounting for approximately 60% of the business of the European operations. The group had grown considerably in the previous few years, primarily on account of acquisitions, but it had got into financial difficulties by virtue of its liquidity position. As a result, the US operations of the group were subjected to Chapter 11 proceedings in the United States in May 2005. The High Court paid attention to Recital 13 and several English court decisions in ascertaining the centre of main interests.<sup>\*21</sup> The norm ‘the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties’ has to be applied, and the court found its guidance in the literature (Dicey & Morris, *Conflict of Laws* supplement 30, paragraph 158), according to which, in order to refute the presumption that the relevant place is the place of incorporation, it is necessary to show that the ‘head office functions’ are carried out in a Member State other than that in which the registered office is situated. The court assessed the evidence from the companies and considered the main administrative functions relating to the European operations to have been carried out from England since 17<sup>th</sup> May 2005: cash co-ordination, pooling of bank accounts for the European operations, co-ordination of human resources, and operation of the IT system, as well as the majority of the sales functions in relation to the European operations being dealt with from England — in particular, all sales to the principal customer in Europe, Ford (again, accounting for approximately 60% of revenue), being handled by the Ford Business Unit in England. The court, finally, was satisfied by the evidence that the centre of main interests of each of the non-English companies was not related to the location of its respective registered office.

Of the questions this judgment raises I mention now only the nature of the approach. With due respect it is submitted that neither from the history nor from the recitals or body of the regulation does it follow that the carrying out of headquarters functions has weight and meaning in the context of deciding upon the issue of international jurisdiction of a court. It functions only as an explanation for said presumption. Whether this should be the most desirable approach is another matter, but, to follow it, the text of the regulation should be changed or the European Court of Justice (ECJ) may provide such an interpretation. In my book I articulate doubts that this will be the case.<sup>\*22</sup>

<sup>19</sup> For an overview, see the article: A. Öunpuu. Problems of Opening Main Insolvency Proceedings. – *Juridica* 2005/7, pp. 475–487 (in Estonian, with English summary).

<sup>20</sup> High Court of Justice (Chancery Division Companies Court), 15 July 2005 (Collins & Aikman Europe SA). – EWHC 2005, 1754 (Ch).

<sup>21</sup> Including BRAC Rent-A-Car International Inc [2003] 1 WLR 40 1421, and Re Daisytek-ISA Ltd [2004] BPIR 30.

<sup>22</sup> See Note 1. See also my article International Jurisdiction To Open Insolvency Proceedings In Europe, In Particular Against (Groups Of) Companies. – B. Wessels. Current Topic of International Insolvency Law. Kluwer 2004, p. 155; U. Huber, Inländische Insolvenzverfahren über

## 5. European Court of Justice, 2 May 2006 (Eurofood)

On 2 May 2006, the European Court of Justice published a long-awaited judgment that is important in the interpretation of COMI. Eurofood IFSC Ltd. was registered in Ireland in 1997 as a ‘company limited by shares’ with its registered office in the International Financial Services Centre in Dublin. It was a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the whole Parmalat Group. On 24 December 2003, in accordance with Decree-Law 347 of 23 December 2003 (*Amministrazione straordinaria delle grandi imprese in stato di insolvenza*, or ‘extraordinary administration for large insolvent undertakings’; GURI No. 298 of 24 December 2003, p. 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, which appointed Mr Enrico Bondi as the extraordinary administrator of Parmalat. On 27 January 2004, the Bank of America applied to the High Court of Ireland for compulsory winding-up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was based on the contention that Eurofood was insolvent. The Irish High Court appointed on the same day Mr Pearse Farrell as the provisional liquidator, with powers to take possession of all of the company’s assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf. Two weeks later, on 9 February 2004, the Italian minister for production activities admitted Eurofood to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator. This was followed a day later by an application filed before the Tribunale Civile e Penale di Parma (the District Court of Parma, Italy) for a declaration that Eurofood was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court of Parma, taking the view that Eurofood’s COMI was in Italy, held that it had international jurisdiction in the meaning of article 3 (1) of the Insolvency Regulation to determine whether Eurofood was in a state of insolvency.

Back in Ireland, by 23 March 2004 the High Court had decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America — namely, 27 January 2004. Taking the view that the COMI of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court of Parma were such as to justify, pursuant to article 26 of the regulation, refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court issued an order for winding up and appointed Mr Farrell as the liquidator. Mr Bondi appealed against that judgment, and the Irish Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the question regarding COMI to the Court of Justice for a preliminary ruling.

On this topic the European Court of Justice (Grand Chamber) on 2 May 2006 (Case C-341/04) ruled as follows:

Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of article 3 (1) of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

The other important decision is that the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening state.

Another judgment of the ECJ is that a decision to commence insolvency proceedings for the purposes of article 16’s rules of automatic recognition is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor’s insolvency and seeking the opening of proceedings referred to in Annex A to the regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator as referred to in Annex C to the regulation. Such divestment implies that

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Auslandsgesellschaften nach der Europäischen Insolvenzverordnung (Domestic Insolvency Proceedings concerning non-German companies according to the European Insolvency Regulation). – E. Schilken et al (ed.). Festschrift für Walter Gerhardt. RWS Verlag Kommunikationsforum 2004, p. 397.

the debtor loses the powers of management that he has over his assets. All of this means that the judgment based on the application on 27 January 2004 before the High Court (Ireland) must be recognised.

As an adherent to the ‘contact with creditors’ approach, I approve of the decision with regard to COMI. For a company or legal person, the presumption is that the centre of the debtor’s main interests is the place of his registered office, but this presumption may be rebutted (see article 3 (1), final line). This presumption should be taken seriously. It may be rebutted only if ‘factors which are both objective and ascertainable by third parties’ enable it to be established that reality differs from legal form (the formal location at that registered office). The ECJ provides two examples: (i) when the company is not carrying out any business in the territory of the Member State in which its registered office is situated and (ii) where the company carries on its business in the territory of the Member State where its registered office is situated. In the first example (PO boxes; sham companies), the presumption may be rebutted with ease. In the second example, COMI might be in the other Member State but “the mere fact that its economic choices are or can be controlled by a parent company in another Member State” is not enough to rebut the presumption. Internal ‘invisible’ (potential) control by the parent will be barely ascertainable, if detectable at all. Rebutting the presumption on the basis of these facts does not work. That is possible only if factors that are both objective and ascertainable by third parties would lead to that consequence.

## 6. European Court of Justice, 17 January 2006 (Susanne Staubitz-Schreiber)

At the beginning of 2006, the first full case ruling concerning the application of the Insolvency Regulation was issued by the European Court of Justice, on 17 January 2006 (Case C-01/04). This decision as well concerns COMI, but for a natural person. The applicant for initiation of insolvency proceedings was Susanne Staubitz-Schreiber, a resident of Germany, where she operated a telecommunications equipment and accessories business as a sole trader. She ceased to operate that business in 2001 and requested, on 6 December 2001, the opening of main insolvency proceedings regarding her assets before the court in Wuppertal. On 1 April 2002, she moved to Spain in order to live and work there. In its judgment of 10 April 2002, the Wuppertal court refused to open the insolvency proceedings applied for, on the grounds that there were no assets. The appeal brought by the applicant in the main proceedings against that order was dismissed in appeal, on grounds that the German courts did not have jurisdiction to open insolvency proceedings in accordance with article 3 (1) of the regulation, since the centre of the main interests of the applicant in the main proceedings was situated in Spain. Staubitz-Schreiber brought an appeal before the German Supreme Court (*Bundesgerichtshof*) in order to have the latter order set aside and the case referred back to the court in Wuppertal. She submitted that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged, or, in this case, by taking account of her domicile in Germany in December 2001. The German Supreme Court referred the following question to the ECJ for a preliminary ruling: “Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?”<sup>23</sup>

Where is Staubitz-Schreiber’s COMI? It follows that, in the case of the main proceedings, the national court must determine whether it has jurisdiction in the light of article 3 (1) of the regulation. The ECJ indicates that that provision does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to commence proceedings but before the judgment is delivered. The ECJ considers a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis to be contrary to the objectives pursued by the regulation. The ECJ submitted that the preambles to the regulation express the intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position: “That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.” Transfer of jurisdiction would also be contrary to the objective of efficient and effective cross-border proceedings, and retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor’s insolvency with

<sup>23</sup> The European Court of Justice first has to deal with the transitional provision of article 43 of the Regulation laying down the principle governing the temporal conditions for application of that regulation: “That provision must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date. That is in fact the case here, since the request by the applicant in the main proceedings was lodged on 6 December 2001 and no judgment opening insolvency proceedings was delivered before 31 May 2002.”

regard to the place where the centre of his main interests was situated upon entry into a legal relationship with him. “The answer to be given to the national court must therefore be that article 3 (1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor’s main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.” It is interesting to note that in the ECJ’s approach to the legal issue at hand, the aims and objectives of the Insolvency Regulation are pivotal. Furthermore, emphasis is placed on the interests and the protection of creditors, which seems to function as a forerunner of the ECJ decision in the Eurofood case.<sup>\*24</sup> On 9 February 2006, the German Supreme Court decided that the judgment of the Wuppertal court of 10 April 2002 should be overturned, and the Supreme Court referred the matter for a new decision to the same court.<sup>\*25</sup>

## 7. Co-ordination of proceedings

As noted above, secondary proceedings may have a winding-up character only (article 27). The model of main proceedings and concurrent secondary proceedings, having this nature, has been criticised. It is submitted, however, that this limitation flows from the clear desire “to achieve a system of international cooperation that is simple and easy to understand”.<sup>\*26</sup> At the same time, during the preparation of (what now is) the regulation, the predominating thought was that “the rules of mandatory coordination and the influence rights given to the main trustee would provide enough means to protect the rescue efforts in the main forum. This line of reasoning explains the rule adopted: secondary proceedings are possible, provided they are of the winding-up type, but they are subject to the [...] main-secondary scheme of coordination”.<sup>\*27</sup> It is mainly within the power of the liquidator in the main insolvency proceedings to exercise measures for co-ordination; e.g., he may request institution of secondary proceedings in other Member States (article 29), participate in secondary proceedings (article 32 (3)), request a stay of the process of liquidation in secondary proceedings (article 33 (1)), request termination of this stay (article 33 (2)), propose a rescue plan in the context of these secondary proceedings, or disagree with the finalising of liquidation in secondary proceedings (article 34 (2)). He shall, furthermore, lodge all claims in the secondary proceedings as have been lodged in the main proceedings (article 32 (2)), and he is duty bound to communicate relevant information (article 31 (1)) and to co-operate (article 31 (2)). Both of the latter obligations are incumbent on liquidators in secondary proceedings too. The mutual duty between liquidators to communicate and to co-operate symbolises the bridging of the still existing deficit of uniform law. Fulfilment of the obligations to communicate and to co-operate is necessary in order to allow for action, with regard to all claims, in accordance with the principle of equal treatment of *pari-passu*-ranked creditors.

In a dozen or so separate provisions, the Insolvency Regulation gives shape to the idea of ‘unity of estate’ (there is, after all, only one debtor), with regard to which he who has the most dominant role (the main liquidator) in principle directs the completion of the insolvency process, under the supervision of a national court. In this process, the main liquidator has, with regard to the secondary proceedings, a set of controlling or co-ordinating (procedural and substantive) powers that he may exert. It is for this reason that for the model of international insolvency law in the system of the EU I apply the description ‘co-ordinated universalism’.

## 8. The procedural context

The formal insolvency proceedings form the point of view of the Community’s approach in tackling certain problems in cross-border insolvencies, while the Insolvency Regulation is part of a more comprehensive framework with regard to cross-border effects of legal proceedings. The general rule here was laid down already in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Insolvency proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions, and analogous proceedings are excluded from the scope of the 1968 Brussels Convention, which itself has been transformed into a regulation too, as of 1 March 2002.<sup>\*28</sup> The EU Insolvency Regulation aims to fill this gap.

<sup>24</sup> See further my comments, together with the ECJ decision of 17 January 2006. – JOR 2006/59.

<sup>25</sup> German Supreme Court, 9 February 2006. – ZIP 2006, p. 529; NZI 2006, p. 297.

<sup>26</sup> See M. Virgós. The 1995 European Community Convention on Insolvency Proceedings: an Insider’s View. – Forum Internationale 1998/25, p. 11.

<sup>27</sup> *Ibid.*

<sup>28</sup> Council regulation No. 44/2001 of 22 December 2000. – OJ L 12, 22.12.2001.

Not all debtors, however, are covered by the Insolvency Regulation. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties, and collective investment undertakings are excluded from the scope of the Insolvency Regulation (see article 1 (2) InsReg). The entities and undertakings that fall under the definitions given by the relevant Community regulations and directives are excluded from the scope of the Insolvency Regulation since they are subject to special arrangements and, to some degree, national supervisory authorities have extremely broad powers of intervention (see Recital 9, InsReg). Both for insurance undertakings and for credit institutions, directives have been specified, with final implementation dates in 2003 and 2004, because, unlike a regulation, a directive must undergo a legislative implementation process in each individual Member State.\*<sup>29</sup>

## 9. Conclusions

The model of the Insolvency Regulation consists of four building blocks: (i) main proceedings, the law of which (*lex concursus*) has universal effect (within the EU); (ii) special rules on applicable law (in contrast to choice of law for *lex concursus*) in the case of particularly significant rights and legal relationships (such as rights *in rem* and contracts of employment); (iii) special ‘territorial’ proceedings (covering only assets situated in the state of commencement of proceedings) to run alongside ‘main’ insolvency proceedings with universal scope; and (iv) co-ordination between these proceedings by liquidators. The model, as indicated and as expressed in Recital 12, acknowledges the existence of widely differing substantive laws, mainly (but not exclusively) the widely differing laws on security interests and the preferential rights enjoyed by some creditors in the insolvency proceedings to be found in the Community. The interpretation of the Insolvency Regulation will be a prime topic in the years to come. The Insolvency Regulation, however, may be seen as a major step in addressing the lacuna of cross-border insolvency within the majority of Europe.

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<sup>29</sup> See directive 2001/17 of the European Parliament and the Council of 19 March 2001 on the reorganization and winding-up of insurance undertakings (OJ L 110, 20.04.2001) and directive 2001/24 of the European Parliament and the Council of 4 April 2001 on the reorganization and winding-up of credit institutions (OJ L 125, 5.05.2001). Implementation dates: 20 April 2003 and 5 May 2004 respectively. See G. Moss, B. Wessels (eds.). EU Banking and Insurance Insolvency. Oxford University Press 2006.