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ARTICLE

The Centre of Main Interest: But Where Is It? I Know Not How to Find It[1]

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I. Introduction[2]

Insolvency law is probably one of the most sensitive areas in international law. The long and stony journey that Council Regulation No 1346/2000 (the European Insolvency Regulation or 'Insolvency Regulation') took till it finally came into force gives proof of those casualties. Thus it is not astonishing that some surprises lie buried within that piece of law, which of course is in the first line no more and no less than a compromise. One of these surprises is the Centre of Main Interest ('COMI'), which sits in Article 3 of the regulatory framework. The COMI appears to be one of the most crucial points within the whole Insolvency Regulation as it determines applicable law and jurisdiction.[3] Thus the Insolvency Regulation ought to be applied as homogenously as possible by the courts of member states in order to establish identical legal circumstances throughout the European Union. It is therefore the purpose of this essay to provide some theoretical underpinnings leading to the better applicability and greater efficiency regarding the Regulation's objectives. The COMI has already been called an 'ugly compromise,'[4] nevertheless as further amendments considering this point cannot be expected in the nearer future, at least some beauty ought to be found in it. A first step on that quest for beauty will be a look at the origin of Article 3, as its legal roots are likely to tell us more about its underlying intentions and purposes. Subsequently, the findings of state courts and the European Court of Justice will be examined. Within the scope of those criteria, this article will attempt to provide an interpretation of Article 3, which serves creditor-protection as well as debtor's interests, especially when considering the concept of corporate rescue.

II. The legal background

It is not the intention of this article to highlight the Insolvency Regulation's genesis starting with the insolvency big bang and ending with the final draft coming into force. Nevertheless, the legal background is of certain value, as it explains the current appearance of the statutes and thus provides interpretation guidelines. Regarding legal entities, European Union member states follow different doctrines for determining jurisdictions. Some states, like Denmark, Ireland and the United Kingdom, subscribe to the incorporation principle, in which the place of the registered office is used to allocate jurisdiction.[5] Other states, such as France, Germany and Luxembourg, follow the real-seat doctrine,[6] which focuses primarily on the place where the company has its effective main centre of operations.[7]

It does not take much fantasy to imagine that those different concepts of jurisdiction allocation governing a company's life echo in some form at the company's death.[8] As this echo is likely to be found in the Insolvency Regulation's wording a closer look at the text itself is of use.

Notes

1 Adapted from a quote by J. W. Goethe and F. Schiller.

2 The author wishes to thank Dr. Paul J. Omar, Senior Lecturer, University of Sussex, for casting a critical eye over the contents of this article. Any errors or omissions are, however, the author's own.

3 Articles 4(1) and 3(1), Insolvency Regulation.

4 See J. Armour, 'Why should we make corporate law?', *EC legislation versus regulatory competition* (2005) at 26, copy available online at: <www.cbr.cam.ac.uk/people/armour.htm> [last viewed 31 May 2007].

5 See P. Omar, 'Jurisdictional Criteria and Paradigms in International Insolvency Texts', (2004) 12 *Insolvency Law Journal* 7 at 20-21.

6 *Ibid.*, listing different variations.

7 See K.E. Sorensen and M. Neville, 'Corporate Migration in the European Union', (2000) 6 *Columbia Journal of European Law* 181 at 184.

8 Or resurrection, in the case of corporate rescue.

Article 3(1), first sentence:

> '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.'

Article 3(1), second sentence:

> '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.'

The COMI itself originates in the real-seat doctrine, as it is supposed to represent the 'focal point of the economic life' of the debtor.[9] The term refers to economic and substantial reality in the company's business conduct. Despite those parallels the term COMI is wider in its wording than comparable phrases in various real-seat doctrines, because Article 3(1) applies to both legal entities and individuals.[10] Furthermore it has been outlined that the incorporation states were not willing to concede more in favour of the real-seat doctrine. Thus a more flexible and open definition had been chosen.[11] Its counterpart, one might say the incorporation echo, has been embedded in the statutory structure. The presumption establishes a 'formal connecting factor' for determining the COMI[12] and thus mirrors the formal character of the incorporation doctrine.

The weighting between both major characteristics, in other words the strength of the assumption will be subject to closer examination in the section below. At this point, only the *dualistic origin* must be underlined. Furthermore, also of remark here is the fact that although the COMI has a strong root in the real-seat doctrine, it is nevertheless an independent legal term – or as it is called, an 'autonomous concept.'[13] Stating this says no more and no less that the COMI is a specific international legal term whose meaning is abstract from national legal phrases, even if those are formally identical.[14] The concept of autonomy serves to prevent 'nationalisation' of the definition and thus divergences in otherwise uniform international texts.[15]

Another questionable point in this context is the role of Recital 13. Its purpose is to provide some guidance in defining the COMI.

> 'Recital 13
>
> The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'

As there is no definition of the COMI provided in the Insolvency Regulation text itself, the recital is all the more of value by channelling and constraining possible interpretations. Recital 13 is part of the preamble and thus an integral part of the Insolvency Regulation itself. What makes it distinct from the normative provisions itself is the mere fact that it does not have binding force.[16] Nevertheless it is part of the legislation and cannot be ignored or circumvented when considering purpose and context of the Insolvency Regulation in order to precise its legal details.[17] In *Eurofood*, the European Court of Justice states that '[t]he scope of that concept is highlighted by the 13th recital of the Regulation…'[18] and thus opposes any doubts about its function. The binding explanatory character of Recital 13 can therefore hardly be called into question.

III. Interpretation

It is the purpose of this part to examine interpretations reached by state courts and the European Court of Justice's ruling in *Eurofood* in order to outline some interpretation-guidance criteria. It has been stated that a certain divergence of interpretation between the courts of member states is inevitable[19] and, bearing in mind that Article 3(1) is a compromise between member states following the real-seat doctrine and those following the incorporation principle, this statement deserves examination. As the presumption can be overturned, the borderline between both concepts depends on the strength given to the presumption. The weaker the presumption, the greater the dominance

Notes

9 See M. Virgos and F. Garcimartin, *The European Insolvency Regulation: Law and Practice* (2004, Kluwer Law International, The Hague) at 37-38.
10 *Ibid.*, at 38.
11 See P. Mankowski, 'Comment on Decision by AG (District Court) München – Hettlage', (2004) 8 *Neue Zeitschrift für Insolvenz und Sanierung* 450 at 451, providing further references.
12 Virgos and Garcimartin, *op. cit.*, at 37.
13 Idem.
14 *Re: Eurofood IFSC Ltd* (C341/04) [2006] ECR I-3813 (ECJ) at paragraph 31.
15 Virgos and Garcimartin, *op. cit.*, at 37.
16 *Ibid.*, at 39.
17 *Idem*.
18 At paragraph 32.
19 See L.C. Ho, 'Publication Review: The European Insolvency Regulation: Law and Practice by Virgos/Garcimartin', (2005) 20(5) *Journal of International Banking Law and Regulation* 249 at 249.

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granted to the real-seat doctrine. Thus, it is feared that if the COMI conforms more to the real-seat principle, it signals a protracted demise for the incorporation principle aspects.[20] Accordingly, it might be expected that courts of member states following the incorporation principle place much more emphasis on the registration presumption. Whether this is the case is examined here.

1. State courts

One of the most prominent judgements given by a state court on the basis of Article 3(1) is probably *Daisytek*.[21] Daisytek-ISA Ltd was an English Company, which served as a holding company for several other companies across Europe. Those subsidiaries fulfilled several functions, but the main business was primarily conducted by the mother itself. According to Article 3(1), the court held that the petitioning company must provide sufficient proof that its COMI is in England to rebut the presumption.[22] The court then went on to examine several factors, which it believed were sufficient to determine the COMI presumption. Those were factors like the separate bank accounts of the subsidiaries, the approval requirements for contracting in excess of a certain value, the appointment of senior employees, the distribution of roles in negotiating and contracting with foreign customers, the total amount of contracts executed and consent requirements in conducting business.[23] In its own words, the court considered 'both the scale of the interests administered at a particular place and their importance and then ... the scale and importance of its interest at any other place which may be regarded as its centre of main interest, whether as a result of the presumption or otherwise.'[24]

The impression cannot be denied that the court with its economic approach[25] did not lay much emphasis on the presumption. The formulation 'whether as a result of the presumption or otherwise' speaks for itself. Although the subsidiaries were incorporated in other countries, the court simply weighed the economic importance of each establishment. This coincides with other observations that even (or perhaps especially) English Courts are quite straightforward in rebutting the presumption.[26] What might look curious at first glance does follow a simple logic – simply expressed as a 'flexible' COMI interpretation in the pursuit of asset grabbing. However, it has to be stated that the court in *Daisytek* did not solely practise a grab rule. It explicitly refers to Recital 13 and emphasises that the COMI must be ascertainable by third parties in order to protect creditors.[27] Although the court follows a quite soft approach in determining the COMI, it shows awareness of this crucial point of creditor-protection.

As regards German Courts, the decision of the *Amtsgericht München*[28] in *Hettlage* is both unsurprising and paradigmatic for its general tendency when it refers explicitly to *Daisytek*.[29] The court states expressly that it determines the COMI by focussing on the company's trading activities, thus subscribing to the economic evaluation approach held by the High Court.[30] The High Court's decision has also been considered as providing an initial impetus to later German Courts claiming jurisdiction more generously.[31] By using this flexible interpretation of COMI, they have joined the race for jurisdiction in order to gather main proceedings, a process that is metaphorically referred to as the 'continental strike-back.'[32] However, this new 'generosity' in claiming jurisdiction is highly capable of seeing overlapping claims occur.[33] The more flexible the determination of the COMI– and an economic weighting between existing establishments[34] is highly likely to be so – the greater is the probability of problematic developments, such as races to the courts, races between the courts, a reluctance for mutual recognition and enhanced risks for creditors due to uncertainty. It is therefore crucial to examine the European Court of Justice's decision in *Eurofood* carefully in order to figure out some constraining guidelines.

Notes

20 Armour, *op. cit*., at 26.
21 *Re: Daisytek-ISA Ltd & Ors* [2003] BCC 562.
22 At 565.
23 *Idem*.
24 At 566.
25 Mankowski, *op. cit*., at 450.
26 Armour, *op. cit*., at 26.
27 At 566.
28 The Munich District Court.
29 AG München, Beschluss vom 04.05.2004 – 1501 IE 1276/04, *Neue Zeitschrift für Insolvenz und Sanierung* at 450.
30 *Idem*.
31 Mankowski, *op. cit*., at 450.
32 *Idem*.
33 See R. van Galen, 'The European Insolvency Regulation and Groups of Companies' (2003) at 4-5, copy available online at: <www.iiiglobal.org> [last viewed 31 May 2007].
34 Whether subsidiaries or mere branches.

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2. The European Court of Justice

Eurofood is just one part within the entire *Parmalat*-insolvency, which merely because of its simple facts was quite impressive. *Parmalat* was the seventh largest industrial company in Italy controlling around 200 subsidiaries, with a personnel of 32,000 and a market capitalisation of €2.5 billion.[35] With a restructured debt totalling €21.2 billion, it was Europe's largest ever insolvency,[36] incidentally revealing the importance of corporate rescue. However, for the purposes of this essay the group-issues are of a lower interest. It is of much greater significance here to analyse the general guidelines given by the European Court of Justice in defining the COMI, regardless of whether it has to be determined in group or a single entity context. Insofar as *Eurofood*/*Parmalat* is truly instructive, it is because there were two different courts in two different member states claiming the presence of COMI and thus an entitlement to open main proceedings.

The court of Parma held that the operational function of *Eurofood* was effectively in Parma and not at its registered office in Ireland.[37] On the contrary, the Irish High Court opened main proceedings while referring primarily on the company's registered office.[38] It might be claimed that the Irish High Court was, in comparison to English Courts, an enthusiastic adherent of the incorporation doctrine, thus strictly relying on the presumption. But it should be called in question whether the decision would have been the same if the operational functions were situated primarily in Ireland and the registered office in Italy. The crucial point in *Eurofood* was a typical group problem, with the major focus on the subsidiary as a tax-efficient vehicle anchored in a tax haven and serving the group's interests.[39] Its sole function was to provide finance for the Parmalat Group. It had no employees and its directors passed decisions the mother required them to pass.[40] Therefore the question concerning Article 3(1) given to the European Court of Justice by the Irish High Court was group specific as well. To simplify it, the question circulated primarily around the problem whether the COMI presumption could be rebutted by the fact that a group mother controls its subsidiary.[41]

Bearing in mind that the Insolvency Regulation's drafters did not want to establish a group jurisdiction rule,[42] it is not surprising that – in the European Court of Justice's mind – the mere fact of control being exercised by a parent company does not determine the subsidiary's COMI.

> 'It follows that ... each debtor constituting a distinct legal entity is subject to its own court jurisdiction.'[43]

> '... the mere fact that its economic choices are or can be controlled by a parent company ... is not enough to rebut the presumption ...'[44]

However, these statements refer primarily to group specific issues and do not tell us very much about COMI determination or the strictness of the presumption in general. The court then proceeds and relies explicitly on Recital 13 in order to outline its major point:

> 'That definition shows that the centre of main interest must be identified by reference to criteria that are both objective and ascertainable by third parties.'[45]

Thus legal certainty and forseeability is guaranteed, especially with a look at Article 4(1) stating that the applicable law is determined by the COMI as well.[46]

The court concludes that the presumption can be rebutted only if factors exist which are – surprisingly – both objective and ascertainable by third parties, showing that an existing situation is indeed distinct from the presumption.[47] It states that this is the case when a mere letterbox company does not carry out any business at all.[48] Indeed a very helpful example. These findings, set out in paragraphs 32-36 of the *Eurofood* judgment, are then repeated once again in paragraph 37.[49] Regardless of how much benefit can be gained from those elaborations, it has to be appreciated that the European Court of Justice underlines the importance of certainty and forseeability – to call the child by its name: creditor-protection. This is indeed the main point in *Eurofood*, some might say the only one. Thus it

Notes

35 See B. Cova, 'International Insolvencies: Parmalat', (2007) 22(2) *Journal of International Banking Law and Regulation* 72 at 72.
36 *Idem*.
37 Judgment reported in English at [2004] I.L.Pr. 14, 273.
38 [2004] BCC 383.
39 See G. Moss, 'Asking the Right Questions? High and Lows of the ECJ Judgment in Eurofood', (2006) 19(7) *Insolvency Intelligence* 97 at 97.
40 *Ibid.*, at 97-98.
41 At paragraph 27; Moss, *op. cit.*, at 98.
42 Mankowski, *op. cit.*, at 450, providing further references.
43 At paragraph 30.
44 At paragraph 36.
45 At paragraph 33.
46 *Idem*.
47 At paragraph 34.
48 At paragraph 35.
49 At paragraph 37 (*repetitio mater studiorum est*!).

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has been criticised in that it is still unclear as to which factors should be taken into account in ascertaining the debtor's COMI.[50] Others point to the missing examination and comparison with the approaches by state courts, as well as a lack of a substantial explanation as to the COMI itself.[51]

These complaints are certainly true, apart from the call for forseeability, the court does not give any COMI–definition. Thus the fear that member states will still vary in their choice of accountable factors may be justified,[52] although the opposite might still be the case, especially where more and more courts follow a more 'flexible' interpretation in the pursuit of gaining jurisdiction. Ironically, this would not be the effort predicated by the European Court of Justice's decision. Nevertheless, what *can* be taken from that verdict is its strict creditor-protection principle. All further approaches and interpretations must fulfil the requirements of certainty and forseeability. All criteria determining the COMI have to be objective and ascertainable.

IV. Article 3 – quo vadis?

Bearing in mind that the European Court of Justice did no more and no less than imposing constraints on possible COMI interpretations, the question of its determination still remains unanswered. This is attempted below. A number of legal problems require, nevertheless, clarification. Firstly, the underlying principles behind the COMI and Recital 13 have to be outlined. This allows, as a preliminary step, for the examination of the ratio and strength of the presumption itself. By throwing light on the given tension between creditor protection and debtor interests, some suggestions to reconcile these contradictory interests may be made.

1. The underlying principles of Recital 13

According to Virgos and Garcimartin, the COMI explanation given in Recital 13 is governed by three fundamental principles: the so-called primacy of administrative connection, the primacy of the external sphere and the principle of unity.[53] However, these three 'principles' can be traced back to some simple ideas. The '*principle of unity*' inherent in the word 'centre' merely expresses the idea that each debtor may possess only one COMI.[54] Bearing in mind that the Insolvency Regulation allows for only a single main insolvency procedure,[55] this principle simply states the obvious. To say it plainly: there can be only one.

The remaining two principles on the other hand express essential ideas, which are highly crucial to the interpretation of the COMI. The '*primacy of the administrative connection*' declares the company's administration to be the determining factor when locating the COMI.[56] Thus it is made clear that the place of control has supremacy over the location of assets or economic activities.[57] Calling to mind the fact that the drafters could have chosen an asset–determined definition as well, it becomes clear that they preferred a simple and clear way for determining the COMI. It is by far less likely that a debtor has two major administrative centres, or in other words, two brains. The debtor's assets on the other hand might either be dispersed homogenously or accumulated at one place, at the very least their allocation being much more difficult. However, the primacy of the administrative connection deals only with the debtor itself within its internal sphere. Thus it can be concluded that the debtor's internal sphere is governed by a '*principle of clarity and certainty*.'

The final principle, '*the primacy of the external sphere*'[58] fulfils a similar function. While the principle of the administrative connection may be considered the manifestation of clarity and certainty in the debtor's *internal sphere*, the primacy of the external sphere is in the *external* incarnation of clarity and certainty. Virgos and Garcimartin state that it depends on how the debtor manifests itself on a regular basis towards the outside world.[59] Recital 13 uses the words 'and is therefore ascertainable by third parties.' From that wording it can be concluded that, in cases of divergence between internal and external spheres, the latter is granted supremacy. It is thus just important how the debtor's administration is perceived.[60] Thus Recital 13 is governed by the ratio of clarity and certainty. In an internal sense, this means that the COMI is determined by the place of administration – the company's brain

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50 See S. Beale, 'The Judgement in Eurofood: The European Court of Justice gives Guidance on the EU Insolvency Regulation', (2006) 21(8) *Journal of International Banking Law and Regulation* 487 at 491.
51 Moss, *op. cit.*, at 98.
52 Beale, *op. cit.*, at 491.
53 Virgos and Garcimartin, *op. cit.*, at 40.
54 *Ibid.*, at 42.
55 See just Article 3(3).
56 Virgos and Garcimartin, *op. cit.*, at 40.
57 *Idem*.
58 *Idem*.
59 *Ibid.*, at 41.
60 *Idem*.

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as the easiest way of locating its centre. In the external sense, it imposes the supremacy of the perception of third parties over internal organisation. Creditors can rely on a COMI that is objectively ascertainable.

2. Ratio of the presumption

Having identified the ratio of the COMI as the ascertainable administration centre, the next question ought to be to ascertain the purpose of the presumption itself. As has already been outlined, the presumption is the manifestation of the incorporation doctrine within the compromise constituting Article 3. Nevertheless, there exist reasons for establishing a presumption in favour of the registered office apart from that. The first reason for the presumption to exist is a question of likelihood – it is assumed that the place of the central administration and the registered office coincide.[61] Furthermore, a formal starting point is provided which makes it easier for the parties to establish a connection to a certain member state.[62] Thus the presumption serves the principle of certainty and clearness and fulfils the same function that has already been found within the COMI itself. Other functions are a shift in the burden of proof in favour of the party claiming the place of registration as the COMI and resolving doubts in cases where facts or claims remain unclear or may be questionable.[63] Therefore, it can be concluded that the presumption provides some procedural guidance on the way in which the burden of proof is distributed, the resolution of doubt and the establishment of a formal COMI connection to a member state. Furthermore, it offers some substantial help by imposing a judgment as to the likelihood in respect of the factual position of the COMI.

3. Strength of the presumption

Having named the presumption's major functions and the principles governing the COMI, the next question to be examined is how strong the presumption ought to be. It has been argued in this context that the faster and easier the presumption can be rebutted, the more its value would be reduced.[64] A presumption ought to be the rule, not the exception, only then would it be of structural assistance.[65] These concerns seem to be confirmed when considering the tendency of state courts towards a greater liberality in claiming jurisdiction.[66] This new liberality appears to be all the more problematic in respect of what might be called system stability. Once main proceedings are opened, other courts are bound by that declaration and may differ only in cases where the public policy exception may be invoked.[67] This principle of mutual recognition and trust has been confirmed by the European Court of Justice in *Eurofood*.[68] If courts practice flexible approaches, the occurrence of concurrent jurisdiction claims becomes quite likely. In the end, this development would lead to greater competition between courts, in a sense a 'first come - first grab' approach. But as the whole Insolvency Regulation rests on the fundament of mutual recognition and cooperation between courts and liquidators, these objectives are undermined.[69] In the end, this might destabilise the legal framework itself.

However, it has to be borne in mind that in strict terms the COMI interpretation itself and the role of the presumption can be distinguished. Considering *Daisytek*, the impression cannot be denied that the courts handle both in a 'flexible' way, thus weakening the presumption *and* softening the strictness of the COMI determination. The court's reasoning is worth quoting again:

> '... requires the court to consider both *the scale of the interests administered at a particular place and their importance* and then ... the scale and importance of its interest at any other place which may be regarded as its centre of main interest, *whether as a result of the presumption or otherwise*.'[70]

The first part shows a soft COMI definition in the shape of a simple economic weighting, while the second part devalues the presumption. Such approaches bring to the fore all the concerns outlined in this context. Regardless of the question of how strong the presumption should be, one thing must not be done – interpreting *both* the COMI *and* the presumption in a flexible way. Either of these has to be determined strictly in order to uphold the criteria of certainty and forseeability imposed by the European Court of Justice. Otherwise the essay title question becomes a reality and the answer a matter of chance. It is arguable that the presumption

Notes

61 *Ibid.*, at 44.
62 *Idem*.
63 *Idem*.
64 Mankowski, *op. cit.*, at 451.
65 *Idem*.
66 See comments above.
67 Articles 3, 16 and 26.
68 At paragraph 38ff.
69 Galen, *op. cit.*, at 4-5.
70 At 566.

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can and should be interpreted weakly, while the COMI determination itself has to follow a *strict* approach. The reasons for that lie in the purpose and functions of the presumption itself. A strict COMI interpretation serves the parties' interests much better, while a strict presumption on the other hand is likely to turn into a threat, as will be explained below.

Forum-shopping

According to Recital 4 of the Insolvency Regulation, it is necessary to avoid incentives for the parties to transfer assets or judicial proceedings to other member states to obtain more favourable legal positions, in short: forum-shopping. However, the Insolvency Regulation leaves open the opportunity of shifting to other jurisdictions in search of 'sunnier countries.'[71] The forum-shopping concern has to be seen in combination with developments arising out of the *Centros*[72] case that are taking place in European company law. The whole dimension of the *Centros* case is still hotly debated and some argue that the European Court of Justice might have implicitly abolished the real-seat doctrine.[73] On the other hand, many commentators doubt whether the real-seat doctrine has been called into question in the *Centros* decision.[74] This is because, in *Centros*, the European Court of Justice was called upon to review the decision of a companies registrar operating in a state (Denmark) which operates the incorporation rule, and thus the real-seat doctrine could not have been the crux of the case.[75] In this light, a number of scholars hold the view that *Centros* did not in fact abolish the real-seat doctrine, but merely addressed the freedom to set up a branch in another member state (freedom of secondary establishment).[76] The freedom of primary establishment and therefore the real-seat theory has neither been addressed nor has it been abolished.[77] Nevertheless, the impression cannot be denied that *Centros* is perhaps a warning not to be ignored and may well prove to inaugurate a protracted demise for the real-seat theory,[78] as has been said: 'Thus Centros is likely to herald a move, sooner or later, towards greater jurisdictional competition in European Union company law.'[79] That quote merits some agreement as it is probable that the real-seat doctrine will fall sooner or later, given that it is 'now fraying at the edges.'[80]

This development is throwing some light on a new aspect in the role of the presumption. Given the fact of the freedom to incorporate within the European Union, a debtor is granted the opportunity of choosing his insolvency law simply by switching its registration. The consequences are clear: the stronger the presumption, the easier it is to move between jurisdictions. In fact, some commentators yearn for that in praising its prospective advantages and it is even suggested that the COMI should *only* be linked to the registered office.[81] In the case of a weak presumption on the other hand, a debtor may switch his COMI only by moving his centre of administration. In this context, it has been correctly noted that the head-office is not merely the name on the business card, but that the head-office is inevitably connected with the carrying out of head-office functions.[82] Thus it becomes by far more difficult to shift to another jurisdiction as it requires a transfer of head-office *functions*.

So should it be made simple for debtors to shift their COMI? It is arguable that a strong presumption with relatively easy COMI-shifting by registering elsewhere would lead to regulatory competition between member states and, in the end, to a 'race to the top' by improving competing insolvency regimes.[83] It is obvious that this debate will run parallel to its 'race to the bottom' counterpart in company law with its inevitable dance around the 'golden calf' of the 'Delaware Effect.' However, two major points render the suggestions made questionable. Firstly, free regulatory competition in company law has led primarily to convergence at the sub-optimal level in combination with the overwhelming dominance of one state.[84] Admittedly, the results of the whole Delaware process are still being debated. To some, it appears highly doubtful that the company law regime of one single state can be so often copied and imitated by other states so as to repeatedly cause Federal interven-

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71 See G. Moss and C.G. Paulus, 'The European Insolvency Regulation – The Case for Urgent Reform', (2006) 19(1) *Insolvency Intelligence* 1 at 3.
72 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] ECR I-1459; [1999] 2 CMLR 551.
73 See e.g. W. Meilicke, 'Niederlassungsrecht von Zweigniederlassungen unter Umgehung des nationalen Rechts', (1999) 52 *Der Betrieb* 625.
74 See e.g. S. Deakin, 'Legal Diversity and Regulatory Competition. Which Model for Europe?', (2006) 12(4) *European Law Journal* 440 at 449.
75 *Ibid.*, at 450.
76 See W. Ebke, 'Centros – Some Realities And Some Mysteries', (2000) 48 *American Journal of Comparative Law* 623 at 631-641.
77 *Ibid.*, at 660.
78 Armour, *op. cit.*, at 8-10.
79 Deakin, *op. cit.* at 451; Armour, *idem*.
80 Deakin, *idem*.
81 Armour, *op. cit.*, at 28-32.
82 Moss, *op. cit.*, at 98.
83 Armour, *op. cit.*, at 28-32.
84 See L.A. Bebchuk, 'Federalism and the Corporation: The desirable limits on state competition in corporate law', (1992) 105 *Harvard Law Review* 1437 at 1483, 1494; Deakin, *op. cit.*, at 446, providing further information and references.

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tion in order to maintain at least minimum standards. However, neither can it be denied that unconstrained state competition is quite likely to produce undesirable outcomes in certain areas, with creditor-protection in insolvency possibly being one of those.[85] As state legislators intend to attract businesses by (re-)designing their law, they become part of the game and thus lose their objectivity. This might well threaten a proper balance between competing interests in insolvency – the temptation of asset grabbing appears *mutatis mutandis* again in shape of insolvency grabs. It has to be asked whether this is desirable. In fact, within the American context, this threat has caused a call for federal legislation, which tends to have much greater objectivity as it is not part of the game. It has been stated that '…we may well be better off with officials who shoot relatively inaccurately at the right target than with officials who would shoot with somewhat greater accuracy but another, wrong target.'[86]

Second, the Insolvency Regulation applies only to collective insolvency proceedings, which entail *partial or total divestment* of a debtor.[87] The reason for that is quite simple: insolvency proceedings follow the objectives of creditor satisfaction and, depending on a state's insolvency regime, corporate rescue.[88] It has been noted that the removal of the shareholders' 'voice' in the circumstances of insolvency must be right since their ownership has been wiped out, thus there is nothing left for them to claim.[89] However, if the debtor inevitably loses control in the case of insolvency, why should he have the right to choose the applicable insolvency regime? To articulate this in a polemic: the debtor determined the company's life, but as the company's death is a matter for its creditors, it cannot be solely up to him as to where to die. Thus, one should think twice before strengthening the presumption or, perhaps even worse, linking the COMI only to the registered office. A dominating presumption may well lead to unconstrained regulatory competition in insolvency law, which is highly capable of resulting in a 'race to the bottom.' Furthermore, it would give the debtor rights in the determination of his insolvency where in fact insolvency serves primarily the interests of his creditors.

A major focus on given facts, say an existing administration centre, would serve the party's interests better. A COMI cannot be shifted so easily.[90] Thus, unpleasant surprises are unlikely to occur. The purpose of reliability, as one aspect of the clarity and certainty principle, is served much better with a weak presumption. In other words: the weaker the presumption and the stronger the focus of the real existing COMI, the more difficult it is to switch the insolvency regime and the lower the incentive for forum-shopping.

Corporate rescue

The point made above has to be viewed together with the aspect of corporate rescue. As all secondary proceedings may only be directed to liquidation proceedings,[91] corporate rescue appears exclusively reserved for main proceedings. In light of the fact that corporate rescue makes more sense where it covers most of the company's assets, the question of the allocation of the main proceedings thus becomes highly crucial. The presumption fulfils primarily the function of simplifying the determination of the COMI,[92] but does not provide a judgment about the probabilities of asset distribution. Apart from that simplification aspect, it has to be asked therefore whether it is more likely that the majority of assets will be situated where the company is administered or where the company is registered. Bearing in mind that a strong presumption in combination with prospective developments in company law that will make it easier to shift the registered office to 'sunnier countries'[93], a coincidence between COMI and assets is more likely than a coincidence between registration and assets. As regards the aspect of corporate rescue, the presumption merely serves as a simplifying indicator. Identifying the real administration centre promises more success in rescue attempts, as it is unlikely that the company's 'brain' will be situated without any 'muscles' around it.[94] In fact, the latter are required for restructuring, otherwise there is nothing to restructure.

Another aspect arising in the context of corporate rescue is the question of whether the Insolvency Regulation may be circumvented in order to achieve corporate rescue. *Collins and Aikman* is a paradigm for such attempts.[95] The crux of the case, briefly summarised, is that creditors were entitled to open secondary proceedings in various countries while the joint administrators of the main proceeding in England

Notes

85 Bebchuk, *op. cit.*, at 1509-1510.
86 *Ibid.*, at 1502.
87 Article 1 I, Insolvency Regulation.
88 See Article 1, Insolvenzordnung (German Insolvency Code).
89 See E. Ferran, 'Creditors' Interests and "Core" Company Law', (1999) 20(10) *Company Lawyer* 314 at 315-316.
90 At least not as easy as a registration.
91 Article 3(3), Insolvency Regulation.
92 Virgos and Garcimartin, *op. cit.*, at 38.
93 Moss, *op. cit.*, at 98.
94 Virgos and Garcimartin, *op. cit.*, at 40.
95 *Re: Collins and Aikman Europe SA* [2006] EWHC 1343 (Ch).

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tried to avoid the proliferation of proceedings and consequent dissipation of the assets.[96] By giving certain assurances to the creditors as to the eventual respect of their priorities under the applicable domestic law, the administrators were able to convince them not to exercise their rights and to benefit in the end from the restructuring of the entire group carried out through one set of proceedings.

However, there is no contradiction between these pragmatic solutions and the Insolvency Regulation. The Insolvency Regulation is a legislative suggestion reconciling competing interests. If parties choose no to use their legal possibilities, regardless of their purposes, they may do so. As long as only the parties are protected and concerned by the Insolvency Regulation, there is no visible reason to prohibit individual and flexible solutions. Apparently, rights of third parties must not be harmed, thus imposing constraints on attempts to deviate from the Insolvency Regulation. Nevertheless, even though this issue arises in the context of corporate rescue, it is not a matter that should influence the Insolvency Regulation's interpretation. Thus, it may be stated here, that a weak presumption with a focus on the company's administrative centre serves corporate rescue better than a strong presumption, but that this interpretation is not designed to prevent 'unorthodox' solutions outside the Insolvency Regulation.

Creditor-protection

One of the most common arguments in favour of a strong presumption is that of creditor-protection.[97] Indeed, creditors have a strong interest in easily ascertaining a debtor's location and thus the competent court as well as the applicable law. It enables them to calculate risks in case of the debtor's insolvency.[98] It also permits them to cope with the factual and legal circumstances in general governing their debtor. Legal certainty and forseeability have therefore been fundamentally endorsed by the European Court of Justice in *Eurofood* and constitute the crucial criteria here.[99] However, that does not automatically entail a call for a strong presumption in order to fulfil this function. Creditors can be protected more effectively by a strict COMI interpretation, as the facts constituting the administrative centre cannot simply be changed. The fact is often neglected that a presumption is quite likely to turn out as a risk for a creditor unduly reliant upon it. In cases where it can be rebutted, a creditor may find himself in the uncomfortable situation of having to cope with another jurisdiction and other courts. Relying on real existing facts, such as the company's administration centre, could prevent such surprises. However, to ensure that the COMI guarantees ascertainment and reliability in order to take that function away from the presumption, its interpretation is highly crucial. Referring back to the principle of clarity and certainty, which governs the COMI,[100] a *strict interpretation* is required.[101]

To ensure a strict interpretation, the COMI must remain restricted by the interpretation guidance given by Recital 13 – the company's administrative centre ascertainable by third parties. Thus it is unimportant where the company's 'muscles' lie, the thing that will count is where the location of its 'brain' is to be found.[102] In that light, the more flexible approach of the High Court in Leeds in *Daisytek* appears questionable as it focuses in general on mere economic factors.[103] The criteria used in that case have to be reconsidered in light of the question of whether they determine the administration centre from a third party's perspective. Factors concerning *internal* organisations or simple economic numbers are thus *inappropriate* for determining the COMI. Some of these were used by the court: the appointment of senior employees, the total amount of contracts executed, consent requirements in the conduct of business, approval requirements for contracting in excess of a certain value as well as the fact of separate bank accounts for the subsidiaries.[104] These are internal facts and often impossible to investigate.

Administration-connected *objective* factors, on the other hand, are *suitable* to provide guidance: the distribution of roles in negotiating and contracting with customers – thus the simple question of who is entering and conducting negotiations? How does the company present itself to the public? Where is the Board and the higher level of executive managers situated? Where do shareholder meetings take place? Where is business mail traffic administered or conducted? All of these factors are either obvious when contracting and interacting with the debtor or may be investigated without great difficulty. Admittedly, even this categorisation of factors does not deliver the holy grail in being able to locate the administrative centre, but it is more secure

Notes

96 At paragraph 4.
97 Mankowski, *op. cit.*, at 451, providing further references.
98 Virgos and Garcimartin, *op. cit.*, at 42.
99 See comments above.
100 See comments above.
101 Galen, *op. cit.*, at 4.
102 Virgos and Garcimartin, *op. cit.*, at 40.
103 Mankowski, *op. cit.*, at 450.
104 At 565.

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than relying on the location of assets or the presumption itself. The company's administrative functions can be identified relatively simply (by contrast with the position of assets) and cannot run away (by contrast with the place of registration).

4. The 'Triple Test'

The task, therefore, is to reconcile all of the factors that have to be taken into account: the simplifying and guiding function of the presumption, the primary focus on the company's administrative centre and with a nod to corporate rescue, under certain circumstances, the debtor's assets. The result ought to be easily applicable and should lead to clear findings. Thus, a three-step-procedure is suggested here:

- Which COMI is presumed by the place of registration?
- Where is the factual COMI? (as objectively ascertainable by third parties by focusing on *head-office functions*)
- If both coincide, the result is clear. In cases where they diverge, where is the economic centre of the debtor?

If the economic focus of interest is in the state of the factual COMI – which is more likely – the factual COMI prevails. If the examination does not lead to *definite* results, the presumption prevails in order to resolve remaining doubts. Steps 1 and 2, with their focus on the conduct of head-office functions as ascertainable by third parties, show parallels to suggestions made by Moss and Paulus.[105] As regards step 3 it might be surprising to see economic aspects taken into account. However, this refers to the more probable *coincidence of the administrative centre with corporate assets* and would support corporate rescue attempts. If such a coincidence does *not* exist – and only then – the doubt-resolution function of the presumption has to prevail. It might be concluded that, in case of divergence between the presumption and the factual COMI, only the former will prevail, usually if there is almost no economic interest at all in the state of the factual COMI. This is indeed no more or less than a shift in weight away from the presumption towards the place of head-office functions.

V. Conclusion

It has been argued that the COMI has to be interpreted strictly by focussing on the company's nerve centre. This interpretation is based on Recital 13 and is governed by the principle of clarity and certainty. Thus creditor-protection is guaranteed, in accordance with the criteria the European Court of Justice imposed in *Eurofood*. The presumption on the other hand ought to be interpreted as being easily rebuttable. A strong presumption is quite likely to provide incentives for forum-shopping and imposes obstacles to corporate rescue attempts and, furthermore, does not serve the interest of creditors in having clarity. The supposed primacy of the factual COMI is mirrored in the 'Triple Test,' which places more emphasis on the factual existence than on mere registration. It is arguable that this serves the creditors' interest in enhancing and improving predictability, while supporting corporate rescue and discouraging forum-shopping.

However, it should finally be clear that the Triple Test is no more and no less than an *interpretation* of the Insolvency Regulation. In contrast to several suggestions for amendments hitherto made, it is argued here that a first attempt should be made to cope with the existing legislative framework. Even though legislative changes are possible (although quite unlikely), this issue is not further canvassed here, as this article is not intended to provide a forecast for improvements to the Insolvency Regulation or any other regulation. Nevertheless, the Moss and Paulus suggestions show that certain amendments could improve the regulatory framework, especially with a view to addressing group-specific problems. Regardless of all the critiques surrounding the Insolvency Regulation, it should finally be possible to achieve its appropriate application with a correct understanding of the presumption and Recital 13. In this respect, the Triple Test-based interpretation may thus help to achieve useful and efficient results.

Notes

105 Moss and Paulus, *op. cit.*, at 2.

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