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EUIR: On the road to Luxembourg

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EUIR: On the road to Luxembourg

Key Issues

- No clear guidance on COMI in the Regulation itself
- Place of incorporation inconclusive
- Local courts put their own spin on COMI
- Parties continue to face uncertainty
- Hopes hinged upon Eurofoods' case and reference to the ECJ
- Case for a central registry?

Introduction

The European Council Regulation on insolvency proceedings (the "EUIR") has been in effect for almost two and a half years. Its primary purpose being to facilitate the proper functioning of the internal market of the EU by ensuring that cross border insolvency proceedings operate effectively. During this time local Member State's courts have been grappling with some of the ambiguities of the EUIR as it is tested by some of the most significant international group insolvencies. It is perhaps not unsurprising that the collapse of the Parmalat group of companies is now at the forefront of the debate on what is perhaps the most vexed issue raised by the EUIR: What is meant by a debtor's centre of main interests? ("COMI") (see below). The first significant reference has now been made to the European Court of Justice ("ECJ") in respect of the Irish incorporated subsidiary of the Parmalat group, Eurofoods IFSC. The ECJ will hopefully provide some guidance for local Member State courts in their approach to a debtor's COMI.

There have been a number of cases in different European jurisdictions on the subject. The purpose of this article is to consider whether we can draw any guidance from the cases, so as to make the risk analysis for parties entering into a transaction more ascertainable from the outset.

This article is going to consider the courts' interpretation of the EUIR on a country-by-country basis. Its focus is going to be limited to the following jurisdictions:

- England & Wales
- France
- Germany
- The Netherlands
- Italy
- Ireland.

No definition of COMI in the EUIR

There has been much commentary on the lack of clarity and guidance available in respect of the EUIR. This is notwithstanding the fact that its origins can be traced back over thirty years to a preliminary draft European Convention for bankruptcy proceedings from February 1970. This is most apparent in the absence of any definition of COMI. What the EUIR does say in relation to COMI is limited to the following:

- "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." (Paragraph 13 of the Preamble to the EUIR); and
- "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 any proof to the contrary." (Art 3(1) of the EUIR).

With little guidance in the EUIR itself, it has therefore been left to the local courts to decide how the EUIR should be interpreted on this point. Unsurprisingly, the approach taken by local courts in the different European jurisdictions has not been consistent.

Virgos-Schmit Report

A number of courts, most notably in England and Ireland, have tried to seek guidance from the Virgos-Schmit Report which was the commentary on the draft European Convention referred to above. Although the Virgos-Schmit Report has no strict legal standing, it would have been binding had the European Convention been introduced as a European Directive as had been originally planned. So perhaps unsurprisingly, the Report has been considered in some cases and its comment on the subject of COMI, namely that it should be based upon "the place known to the debtor's potential creditors", has seemingly influenced the various judges' findings.

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Local spin on COMI

The cases of greatest significance on this subject are set out in the table at the end of this briefing, which highlights the key factors influencing the courts as to the determination of COMI.

England & Wales

Key elements in determining COMI

- Location of management important
- Trade creditors and financiers perception of COMI
- Location of administrative functions important

The English courts have exercised their jurisdiction under the EUIR a number of times. An example of this (not long after the EUIR came into effect) was provided by a decision of Lightman J (4 July 2002) (unreported) in the case of *Enron Directo SA*. Although the company in this case was incorporated in Spain, the English court was able to exercise its jurisdiction over the company finding that its headquarters, and all financial and economic decisions were made in London and therefore, for the purposes of the EUIR, its centre of main interests was in London.

Similarly, in the case of *Re BRAC Rent-a-Car-International Inc [2003] 2 All ER 20 ("BRAC")*, the English court exercised its jurisdiction in making an administration order in respect of a Delaware incorporated company. It found that the company never traded in the US and all of its operations were conducted in the England. This shows the wide ranging impact of the EUIR which may apply to entities which have been incorporated outside the European Union, but have their COMI in a Member State. The judge considered that to limit the effect of the EUIR to entities incorporated within a Member State would prevent it from achieving its purpose and leave it open to avoidance, giving companies the opportunity of incorporating in foreign jurisdictions where, in all but this respect, the COMI was in a Member State.

The *BRAC* case has recently been endorsed in *Ci4net.com (unreported 2 June 2004)* the first contested English case under the EUIR initiated by a creditor and opposed by the company. The creditor asserted that the COMI was in England notwithstanding the fact that the companies in question were registered in the US and Jersey. One of the most significant factors identified by the court was the importance of trade creditors being certain in the knowledge of where they can pursue assets and that place having some element of permanence. The court was persuaded that even though the companies were registered elsewhere, correspondence and representations made to its most substantial creditor all pointed to the company having its principal executive offices in England. The fact that the directors were resident in England was also taken into account.

Similarly, the findings in BRAC were also considered in the case of *Re Aim Underwriting Agencies (Ireland) Limited (unreported 2 July 2004)*. This case related to an Irish incorporated company, though its COMI was held to be in England since it was wholly controlled and managed from England by its parent company. The Irish company had no employees and its only known creditor was its parent.

There is one English case which deserves significant comment in this regard, namely *In re Daisytek-ISA limited (Ch D Leeds District Registry, 16 May 2003)* ("Daisytek"). In this case the English court made administration orders in respect of German companies and a French company. The decision is important since it shows how the EUIR has extended the jurisdiction of the English court.

The real significance of *Daisytek* is the consideration given to the COMI issue. In accordance with Art 3(1) of the EUIR, the judge sought evidence from the petitioning creditor to rebut the presumption that the place of the respective companies' registered offices denotes the COMI. In that case the following factors were taken into account:

- administration carried out in England through English wholly owned subsidiary;
- finance function was operated from England;
- approval was needed for purchases over €5,000 from England;
- employees were recruited in consultation with England;
- technology and information was operated from England;
- customers based in France and Germany were serviced from England; and
- majority of purchases made and dealt with by England.

The judge noted that the identification of the COMI required the court to consider both the scale and importance of its interests administered at a particular place and then consider the same factors in relation to any other place where it may be regarded as having its COMI. As most applications for administrations are made without any formal notice to a company's creditors, (save where it is required to obtain a floating charge holder's consent or in the case of execution creditors), the court will be reliant upon the applicants to give a full and honest disclosure of the company's interests and how and where they are administered. The judge in *Daisytek* also afforded great weight to the COMI being ascertainable by third parties and referred to the Virgos-Schmit Report which explained the rationale for the rule. In the *Daisytek* case, since the company was a trading company, the judge identified that its most important

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group of creditors were its financiers and trade creditors. In this case, significant factors were: the business was funded by a factoring company which was an English subsidiary of the Royal Bank of Scotland, and 70% of the goods supplied to the German subsidiaries were supplied under contracts made by one of the main English subsidiaries in the group. Further, that in comparing the administrative functions carried out in the respective jurisdictions, the Judge found that a more significant proportion of those functions was carried out in England compared with Germany or France. In relation to the third party perception of COMI, there is no independent evidence from any creditors of the French or German companies, so the court was reliant upon the submissions of the applicant.

France

Key elements in determining COMI

- Importance of registered office
- Companies in a group should be treated as separate legal entities
- Court first to assert COMI prevails

The same French company in the Daisytek group which had been the subject of an administration order in England, was then placed into separate main proceedings by a French court in Cergy Pontoise. This was on the basis that the English court was wrong to assert jurisdiction based on its COMI being in England. It was argued that the English court had ignored the general principles of corporate identity in relation to group companies where, absent any special factors, each company in the group should be treated as a separate legal entity and, further, that the EUIR did not regulate group insolvency situations. There is little in the judgment to assert why the COMI should in fact be in France, other than the company had its registered office there. The court in Cergy Pontoise opened administration proceedings which were only available as main proceedings in the context of the EUIR. The Court of Appeal of Versailles (4 September 2003) (No 03/05038) confirmed that the sole factor which determined jurisdiction of the main proceedings under the EUIR was the COMI of the debtor. It meant that the English court had founded its jurisdiction on this basis and had not based its decision on the concepts of establishment, groups or subsidiaries. The English court was first to assert jurisdiction as to the COMI of the debtor. The challenges made by the French administrator based on failure to file or serve the administration proceedings on the French subsidiary, or that the English administration order violated Article 6 of the European Convention on Human Rights and French public policy under Article 26 of the EUIR were rejected. The Court of Appeal of Versailles found that there were no formalities for recognition which were required to be fulfilled in accordance with Article 17 of the EUIR. Nor was there any need to serve the French subsidiary with the English court documents since it was the French subsidiary's petition to the English court. Further, there was no violation of the French administrator's right to be heard since he was appointed subsequently and contrary to the provisions of the EUIR in any event.

The appeal judgment focuses on the technicalities of the EUIR and the fact that they were ignored in the court in Cergy Pontoise. The judgment does not go beyond the fact that the French court never had to consider the issue of COMI, since the English court being the court first seized had already decided the issue, and that decision pursuant to the provisions of the EUIR was binding on the French court.

Germany

Key elements in determining COMI

- Place where management conducted
- Place where administrative functions carried out
- German courts willing to use EUIR to deal with cross border group insolvencies

Notwithstanding the fact that on 16 May 2003 the High Court of Leeds opened main proceedings against three German debtors, an intermediate holding *(PAR Beteiligungs GmbH)* and its two operative subsidiaries *ISA Deutschland GmbH* and *Supplies Team GmbH* following an application of the Group's Chief Operating Officer ("COO") and Managing Director of the intermediate holding, an English individual, who stated that the COMI of all three German debtors was in England, the German courts were also approached to open main proceedings. Following applications to open main insolvency proceedings the local court in Düsseldorf court opened:

- secondary proceedings (Article 27 EUIR) in the case of the intermediate holding *(PAR Beteiligungs GmbH)*; but
- "competing" German main proceedings against both German operating subsidiaries, hence disregarding the prior decision taken by the High Court in Leeds to open English main proceedings (cf Article 16 Para 1 EUIR).

The decision of the local court to open competing main proceedings in the case of the two German Subs was, in essence, based on the assumption that the decision of the English Court constituted a violation of public policy (Article 26 EUIR) arguing that the applicant was neither an appointed director of the respective debtors nor did the applicant have a sufficient proxy so that the principle of due process of law was allegedly violated.

Both decisions of the Düsseldorf local court of 10 July 2003 to open competing German main proceedings were appealed by

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the joint English administrators appointed in the English main proceedings. Based on decisions of the German appellate court on 12 March 2004 and 7 April 2004, the local court in Düsseldorf has now ordered (i) the close of the German main proceedings *(Verfahrenseinstellung)* it had opened in July 2003, and (ii) the opening of secondary proceedings according to Article 27 of the EUIR. The reasoning of the court orders was based upon the fact that one of the German directors of *Supplies Team GmbH* and of *ISA Deutschland GmbH* granted "oral" proxies to the applicants, the Group's COO, to file on behalf of *Supplies Team GmbH* and *ISA Deutschland GmbH* in England, so that the Düsseldorf court could no longer uphold the view that the English Court's decision constituted a violation of public policy.

A more recent example of the German courts exercising their jurisdiction under the EUIR arose in respect of a German subsidiary of Warranty Holdings International Limited. On 27 April 2004 the local court of Moenchengladbach, made an order for the commencement of main proceedings in Germany notwithstanding the fact that a winding up petition had already been presented in respect of the same company in England.

The director of a German GmbH (the "Debtor") filed a petition to commence main proceedings in England against the Debtor arguing that relevant financial and all strategic decisions regarding the Debtor were taken in England, so that the Debtor's COMI was in England. About a week thereafter, however, prior to the English court having decided on the petition filed in England, the director filed a petition to commence secondary proceedings against the debtor in Moenchengladbach, Germany. Administrators had been appointed in respect of the English parent Warranty Holdings International Limited on 24 March 2004.

The local court in Moenchengladbach, held that:

- a petition to file secondary proceedings can be interpreted as a petition to commence main proceedings if the court concludes that the commencement of main proceedings would be appropriate (and the debtor's COMI was where the petition for such secondary proceedings was filed);
- German main proceedings can be commenced regardless of the fact that a petition to commence main proceedings has been lodged in England as long as the English court has not yet decided on the petition; and
- the COMI of an incorporated debtor is where the debtor trades and not the place where its strategic decisions are taken.

The local court in Munich held in the Hettlage case on 4 May 2004 that the COMI of a 100% subsidiary is deemed to be at the COMI of the respective parent company if such parent "conducts the business of such subsidiary and renders essential services to such subsidiary". The determining factors for establishing the COMI in Germany in the Hettlage case were that (i) the management of the German holding company conducted the business of the Austrian subsidiary, (ii) the distribution of goods of the subsidiary was managed in Germany, (iii) the purchasing of goods for the subsidiary was centralised in Germany and (iv) the holding company provided its subsidiary with all back-office services for instance controlling, organisation, computing, planning, insurances and marketing.

Another German case is to be referred to the ECJ by resolution of the German Federal Court on 27 November 2003. This case concerns the COMI in respect of an individual, rather than a corporate entity. The question to be decided by the ECJ is how to determine the COMI of a German debtor (natural person) if the debtor has moved to live and work in Spain after the filing of the petition for the commencement of insolvency proceedings in Germany. At the date of the petition, the debtor's COMI was in Germany. The German Federal Court wants to clarify whether the German or the Spanish court is the competent one and thus, how forum shopping will be treated in future.

On 23 January 2004 the local court in Cologne granted an order which basically introduces the concept of group insolvency in German crossborder insolvency proceedings under the EUIR. Following English administration orders in respect of certain companies of the *Automold Group* secondary insolvency proceedings were opened in the specific form of self-administration (*Eigenverwaltung:* a German form of debtor-in-possession proceedings) at the place of the establishment in Germany. The English joint administrators, who were appointed as debtor-in-possession managers in Germany, will administer those secondary proceedings, whilst a German administrator will assist as trustee in a supervisory function.

The decision, however, does not deal with the question to what extent and how any conflicts of interest arising (e.g. a dispute over the amount of claims owed to Automold Germany by its English parent) will be addressed. In summary, the decision may provide a solution as to how to deal with cross border group insolvencies in the context of the EUIR and quite likely to facilitate procedures in such cross border insolvencies, provided there is an assumed commercial interest on the side of all creditors in a restructuring of the insolvent group entities as a whole.

The Netherlands

Key elements in determining COMI

- Cases so far only consider insolvency of individual
- Important factor when dealing with individual's COMI, where exercised professional activities
- Place of habitual residence, not a rebuttable presumption

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A parallel case to the German case which has been referred to the ECJ has been decided by the Court of Appeal in Amsterdam on 17 June 2003 where the Dutch debtor had finished her professional activities and moved to France, a year prior to her insolvency. The sole fact of moving to another country, according to the Dutch court, does not lead inevitably to the conclusion that the debtor's COMI is no longer in the Netherlands. By giving the answer to the question where the debtor's COMI is, the court held that she had exercised her (professional) activities in the Netherlands, from which activities the claims in the insolvency originated. This was an important factor in the court's decision. (Court of Appeal Amsterdam 17 June 2003, JOR 2003/186).

On 9 January 2004 the Supreme Court considered a further case in the context of the EUIR, it ruled that the "place of habitual residence" as referred to in paragraph 75 of the Virgos-Schmit Report is not a rebuttable presumption for the centre of main interest of the debtor, where the debtor is an individual (see HR 9 January 2004, RVDW 2004, 12). The rebuttable presumption only exists with respect of a company's registered office. The decision of the Supreme Court concerned the opening of main insolvency proceedings in the Netherlands of an individual who resided for the previous 10 years in the Caribbean and at the time of the judgment resided in Belgium. The court assumed however that the administration of his interests remained in the Netherlands because the debtor had substantial interests in various companies based in the Netherlands.

Italy

Key elements in determining COMI

- Place where management activities based
- Place where control is exercised
- If company could be considered a mere branch of its parent

In the recent collapse of the Parmalat group, the Italian court has exercised its jurisdiction under the EUIR by placing Dutch, Luxembourg and Irish incorporated companies into Italian extraordinary administration.

On 30 January 2004, the Parma court admitted Parmalat Finance Corporation BV to the extraordinary administration procedure on the basis that, notwithstanding the fact that its registered office was in the Netherlands, the management activities which were the driving force of the company, operated in Parma. Important factors for the determination of COMI were as follows:

- the company had no employees in the Netherlands;
- the company had no offices in the Netherlands;
- the company's investors were located outside of the Netherlands;
- the company was managed by Italian banks or international banks;
- the company's bonds were guaranteed by the Italian parent;
- the company was registered in the Netherlands only for tax reasons;
- the company could be considered a financial branch of parent company; and
- the company was controlled by its parent from an office in Parma.

Almost identical orders with the same reasonings were made in respect of companies incorporated in Luxembourg (Olex SA and Parmalat Soparfi SA) and Ireland (Eurofoods IFSC Ltd ("Eurofoods")) – see section below for Ireland. An appeal has been launched in respect of the Parma court's decision to open main proceedings in respect of Eurofoods, an Irish incorporated company which was already subject to provisional liquidation in Ireland. This is due to be heard in November 2004, and may result in a referral being made to the ECJ. (The Irish court has already referred its proceedings to the ECJ, see below)

Ireland

Key elements in determining COMI

- Place of incorporation
- Creditors' understanding and perception of COMI important
- Place where administration conducted
- Place where accounts maintained

A recent decision in the Supreme Court in Ireland has underlined the potential conflicts which may arise as local courts exercise their jurisdiction under the EUIR. This decision relates to a subsidiary of the Parmalat Group, Eurofoods, a company incorporated in Dublin. The conflict arose when, notwithstanding the appointment of provisional liquidators in Dublin, the Parma court proceeded to open extraordinary administration proceedings and determined that the company's COMI was in Italy. The Dublin court reasserted its jurisdiction by formally winding up the company on 23 March 2004 with effect from 27 January 2004, the date the winding up petition was first presented. This was upheld on appeal by the Supreme Court on 27 July 2004. (See our client briefing from July 2004 for more detail on the facts of this case).

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Eurofoods	
COMI in Ireland?	COMI in Italy?
Incorporated in Ireland	Incorporation in Ireland, presumption rebutted
Subject to fiscal and regulatory provisions in Ireland	Company a conduit for financial policy of Italian parent
Day to day administration in Ireland	Exclusive point of reference to Italian parent
Accounts maintained in Ireland	Operating office based in Italy
Board meetings took place in Ireland	Central management function in Italy
Creditor perception of COMI in Ireland	

The Supreme Court makes some observations about the recognition of judgments delivered by Member States being based on a principle of mutual trust and that this mutual trust should be the basis upon which any dispute arising should be resolved. In particular, the decision of the first court to open main proceedings should be recognised without other Member States having the power to scrutinise that decision.

Perhaps the most significant point to be made is the different interpretation of COMI by the Irish and Italian courts with regards to Eurofoods, which exemplifies how the lack of guidance given in the Regulation can result in two different courts asserting that the COMI falls within their respective jurisdiction. The table above sets out the factors influencing the Irish and Italian courts in their finding the COMI of Eurofoods was in their respective jurisdiction.

The Eurofoods' case also shows the different treatment within the local jurisdictions as to the timing of the opening of proceedings. In Ireland the principle of relation back, in respect of a winding up petition, means that the order made is effective from the date the petition is presented, not the date of the order being made.

The integrity with which each Member State court seeks to exercise its jurisdiction under the EUIR is obviously key to its success. Competition between Member States to exercise their jurisdiction will no doubt undermine the purpose of the EUIR, in adopting a uniform approach to the appropriate forum and governing law for any given insolvency.

Hopes hinged on reference to ECJ

Achieving certainty in instances where there are competing court decisions at present is only possible by way of reference to the ECJ.

The recent reference in the Eurofoods insolvency will hopefully provide the ECJ with an opportunity to provide some general guidance as to the necessary factors to take into account when exercising jurisdiction and asserting COMI.

The questions to be considered by the ECJ can be summarised as follows:

1. Is appointment of a provisional liquidator and presentation of a petition a main proceeding?
2. Is presentation of a winding up petition a main proceeding?
3. Where proceedings are commenced first in a Member State, other than the state of incorporation, or where the COMI is located, by virtue of Articles 3 and 16, can proceedings in that state be opened as main proceedings?
4. What are the determining factors for establishing the COMI of subsidiaries?
5. Does Article 17 of the EUIR mean Member States are bound to give recognition to decisions of another Member State, even if contrary to public policy?

The decision of the ECJ will hopefully provide some guidance on the most vexed issue under the EUIR in relation to COMI. The questions, in particular those set out in 3, 4 and 5 above, will be of general importance for individual member states, especially in relation to cross border group structures. Technically, the decision of the ECJ will only bind Ireland as the Member State that has made the reference, but generally speaking other Member States should also give recognition to the decision.

Impact on deal structure

We now consider the implications of the displacement of an entity's COMI. In particular, the COMI will determine which insolvency regime and law applies. This may impact upon a creditor's right to take action and, because of different Member States' approach to, for example, inter-company debts and

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substantive consolidation, this could significantly affect a creditor's ability to recover from an insolvent party. Although as a matter of English law the separate legal personality of a company is only ignored in exceptional circumstances, in some European jurisdictions this is not the case and the responsibility of a parent for its subsidiary may extend beyond the notions of separate legal personalities. Similarly some European jurisdictions will readily re-characterise inter company debts as equity. It is therefore crucial that parties to a transaction which involves finance to businesses with interests in a variety of jurisdictions, analyse the risks and impact of the EUIR at the outset.

Factors to consider:

- the identity and location of the parties;
- the type of transaction involved (whether it would benefit from one of the exceptions to the EUIR i.e. the security exception);
- where the debtor's COMI is located;
- where the assets are located; and
- whether there are any establishments.

To minimise the risks associated with COMI displacement, representations from the Obligor and restrictions as to COMI changes may be included in the documentation. The inclusion of such representations and covenants will not be determinative as to an entity's COMI, but evidentially will assist as indicative of the premise upon which third parties originally contracted with a debtor. In addition, careful thought should be given as to obtaining legal opinions in each relevant jurisdiction.

Conclusions: Common themes

It is difficult to draw many common themes from the local courts' application of the EUIR in relation to COMI. One factor which does seem to cross the jurisdictional boundaries is the importance of third party perception when considering COMI. This means that, practically speaking, for companies to give representations or agree to covenants in documentation that their COMI is located and will remain in a particular jurisdiction may be useful to show evidentially that the perception of the third party is based on representations made to it by the debtor. Also, given that a significant number (certainly within England) of applications to be made to the court for insolvency proceedings which are made *ex parte* by the company or even out of court altogether, the scrutiny afforded to a third party's perception of COMI may be absent or totally dependent upon the integrity of the applicant or those appointing an insolvency office holder. It is undoubtedly open to manipulation (as we have seen in the *Eurofoods* case and the *German Automold* case) not necessarily for any unworthy motives, but to facilitate group restructurings. This may be in the interests of the majority of creditors at group level, but may lead to creditors of individual group companies being prejudiced. The local courts' approach to and consideration of evidence in respect of third party perception of COMI is therefore almost as vexed an issue as COMI itself. It may be that a practice develops whereby parties seeking to rebut the presumption that the COMI is in the place of incorporation will be required to submit evidence from creditors supporting the fact that the COMI is in another Member State. Similarly, it may be that the courts scrutinise more closely the basis for founding a COMI and are more likely to overturn appointments where there has been no independent creditor evidence – or where the out of court procedures are used when there are unresolved issues relating to COMI.

Certainly there are some common themes which can be taken on an individual jurisdictional level from looking at the above cases. For example, parties to a transaction may take some comfort from the fact the English courts have based COMI on management and finance operations being in England, but this in itself presupposes that the parties have some way of narrowing the potential forum down when it comes to insolvency proceedings being commenced. This becomes increasingly difficult in circumstances where there are complicated cross border group structures and businesses expand.

Requirements for central registry

Although the EUIR provides for European-wide recognition of main proceedings, since there is no central registry, local Member State courts have no point of reference to ascertain whether they are seeking to assert jurisdiction based on COMI which would compete with judgments already made by the local court of another Member State. Although in most instances applications for the opening of insolvency proceedings will be made by the debtor or on notice to the debtor. The local courts are reliant upon full disclosure by the applicants so as to avoid opening insolvency proceedings for an entity which is already subject to another Member State court's jurisdiction.

Enthusiasm of courts to assert jurisdiction

The early English jurisprudential activism is now being followed in Italy and elsewhere. Initially this enthusiasm was welcomed but now that other jurisdictions are jumping on the EUIR bandwagon, attitudes may change, especially following the expansion of the EU. The manipulation of the EUIR in respect of extending a Member State court's jurisdiction may in some circumstances result in forum shopping, something the EUIR was designed to prevent. On a positive note there are prospects of using the EUIR in pan-European restructurings through use of compositions in main proceedings. This is already coming to light and was adopted in the *Daisytek* and *German Automold* cases referred to above which illustrate that the operation of the EUIR may be useful in cross-border restructurings, although it is doubtful that it was intended to extend the jurisdictional borders in this way.

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COUNTRY/CASE	PRINCIPLES FOR DETERMINING COMI[1]
England Telia v Hillcourt [2002] EWHC 2337	Company registered in Sweden. Existence of a subsidiary in England did not constitute sufficient basis for an establishment. No establishment in England.
Re BRAC Rent-a-Car International Inc [2003] 2 All ER 20	Company registered in Delaware. Trading in England. Never traded in US. Employees in England. Operations in England. English law governed contracts. COMI in England.
Enron Directo SA (Ch, 4 July 2002)	Company registered in Spain. Head office functions based in England. All employees and operations in Spain. COMI in England.
In Re Daisytek-ISA Limited (Ch D Leeds District Registry, 16 May 2003.)	Companies registered in France and Germany. Administration carried out in England through English wholly-owned subsidiary. Finance function was operated from England. Approval was needed for purchases over €5,000 from England. Employees were recruited in consultation with England. Technology and information operated from England. Customers based in France and Germany serviced from England. 70% of purchases negotiated and dealt with in England. All corporate identity and branding run from England. German company required to follow strategy drawn up by English CEO. CEO spent 30% of time in Germany and 40% of time in France. COMI in England.
Re Salvage Association [2003] EWHC 1028 (Ch)	Association registered by Royal Charter in England. COMI in England even though not a "company".
Re Marann Brooks CSV Ltd [2003] BCC 239	Whether a winding up petition on the grounds of s124A IA 1986 (Public interest) fell within the scope of the EUIR. EUIR did not apply, since not based on insolvency but public interest.
In Re Arena Corporation [2004] WCA Civ 371	Company registered in Isle of Man. Director and shareholder, resident of Denmark who argued COMI was in Denmark. Court held that the EUIR had no application to Denmark since it had opted out of the EUIR and the effect of Recital 33 was to exclude Denmark from the definition of Member State. Company was wound up on basis of s221 IA 1986. EUIR did not apply.
Ci4net.com (unreported judgment 2 June 2004)	Companies registered in Delaware and Jersey. None of the Jersey directors resident in Jersey, two in England. Correspondence and draft SEC filings represented that company based in England. Communications with HSBC (its most substantial creditor) contained representations as having principal executive offices in England. Scale of activities and importance in London second to none. Trade creditors should know in what jurisdiction they can pursue assets. COMI must have some element of permanence. COMI in England.

[1] The factors set out in this table are by no means an exhaustive list of the considerations which a local court would take into account.

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Key cases on the EUIR – *continued*

COUNTRY/CASE	PRINCIPLES FOR DETERMINING COMI[1]
Crisscross Telecommunications (unreported)	Various European registered companies. Board decisions taken in England. Management and administration carried out by employee to English company. Majority of business English company contracts governed by English law. COMI in England.
Re Aim Underwriting Agencies (Ireland) Limited (unreported 2 July 2004.)	Irish incorporated company. Wholly owned subsidiary of English company. Director based in England and solely responsible for business. Finance controlled from England. Parent controlled the administration and management. No employees. Only known creditor was parent which knew reality of the position. COMI in England.
France Daisytek (Versailles Court of Appeal September 2003) (Further appeal pending), filed Feb 2004	Company registered in France. At first instance it was argued that the French company was a distinct legal entity. Presumption that COMI where company registered not rebutted. This was overturned on appeal, the English administration proceedings being commenced first were the main proceedings for the purposes of the EUIR and no formalities were required for the administration to be recognised in France. COMI in England.
Germany Daisytek ISA March 2004 appeal court terminates main proceedings opens secondary proceedings	Companies incorporated in Germany. At first instance the German Courts refused to recognise English administration orders on the basis it was contrary to public policy. The decisions, based on incorrect evidence were later overturned on appeal. COMI in England.
Subsidiary of Warranty Holdings International Limited (27 April 2004, Moenchengladbach)	Company registered in Germany. COMI is where the debtor trades, not where strategic decisions are taken. COMI in Germany.
Hettlage (Munich 4 May 2004)	Wholly-owned subsidiary of German company. Subsidiary incorporated in Austria. Managed by German parent. Administration provided by German parent. COMI in Germany.
German Federal Court 27 November 2003	COMI of individual. German national moved to live and work in Spain, filed for bankruptcy in Germany. COMI in Germany. Reference to ECJ to clarify whether Germany or Spain is where individual's COMI is.
Automold Group (23 January 2004)	COMI of German subsidiaries in England. Secondary proceedings opened in Germany based on establishment in Germany.

[1] The factors set out in this table are by no means an exhaustive list of the considerations which a local court would take into account.

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Key cases on the EUIR – *continued*

COUNTRY/CASE	PRINCIPLES FOR DETERMINING COMI[1]
Ireland Eurofoods IFSC Ltd [2004] IEHC 54	Company incorporated in Ireland. Creditors understanding and perception of COMI in Ireland. Located in Ireland. Subject to fiscal and regulatory provisions in Ireland. (Tax benefits conditional upon it being managed in Ireland). Day-to-day administration conducted by Bank of America on behalf of company in Ireland in accordance with agreement governed by Irish law with Irish jurisdiction clause. Accounts maintained in Dublin. Tax paid in Ireland. Board meetings held in Ireland. Attended by 2 Irish directors (2 other directors were Italian directors resigned November 2003). COMI in Ireland.
Italy Parmalat Finance Corporation BV (Parma 4/02/04)	Company incorporated in the Netherlands. All management activities and driving force for the company was in Parma. No employees. No offices. Bonds issued to professional investors in Italy, institutional investors abroad and managed by Italian banks. Bonds guaranteed by Italian parent. COMI in Italy.
Eurofoods IFSC Ltd 20 February 2004	Company incorporated in Ireland. Company was a conduit for financial policy of Parmalat. Exclusive point of reference to Italian parent. Actual operating office was Italian parent's office which was where the central management function was. COMI in Italy.
Olex SA and Parmalat Soparfi SA	Company incorporated in Luxembourg. Company was a conduit for financial policy of Parmalat. Exclusive point of reference to the Italian parent. Actual operating office was Italian parent's office which was where the central management function was. COMI in Italy.
The Netherlands Interexx Enterprises Ltd (Court of Appeal of the Hague 8 April 2003)	Company incorporated in England. Companies House search indicated company closed down on 3 July 2001. Director of Interrexx resident in the Netherlands with full authority. COMI in the Netherlands.

[1] The factors set out in this table are by no means an exhaustive list of the considerations which a local court would take into account.

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