

Does an international business enterprises group have one COMI or not, that is the question

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Prelude

Mart Franken was already a respected liquidator in the Netherlands when I met him for the first time in 1994. The occasion was the first so called Insolad Course, a course which in the meantime has become the yardstick for liquidators in the Netherlands. You are only able to become a full member of Insolad if you finish the course. I was then a young advocaat (admitted to the bar of The Hague in 1989) and was allowed to join the first class for the Insolad Course. It was apparent that Mart was not only an experienced liquidator, but he was also interested in the law. In 1999 I left the bench to over the – what liquidators might call – dark side, the bank. Banks and liquidators are the natural enemies when it comes to insolvencies in the Netherlands. I make it no secret that I am not a friend of bad liquidators, those who are fit for their job. Mart is fit for the job, and although Mart and I occasionally bumped into each other as opponents, I cannot remember that I have ever been into a useless fight with him. We met much more frequently in what I call the social insolvency scene of the Netherlands meetings of Insolad, Insol Europe or Insol World. When in the Summer of 2013 one Mart's partners asked me to cooperate to prepare of book in honor of Mart's 40h year as advocaat, I accepted promptly. The topic I choose is the issue of COMI in international business enterprise groups.

Introduction

This note deals with the question whether or not an international business enterprises group, i.e. a group of two or more enterprises in different nations which are interconnected by control or significant ownership¹, has one or more so-called COMIS, centres of main interest. This question is relevant since the decision in which jurisdiction the COMI of a legal entity is, plays an important role in cases of international bankruptcies. The determination of COMI under the European Council (EC) Regulation No. 1346/2000 of May 29, 2000 on insolvency proceedings (the "EC Regulation") relates to the jurisdiction in which so-called main proceedings should be commenced. The determination of COMI under the so-called UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") relates to the effects of recognition, principal amongst those being the relief available to assist the foreign proceeding². This note first deals with the definition of COMI in the EC Regulation and the Model Law. It continues with some case law on COMI in relation to both the EC Regulation and the Model Law, followed by short summaries of the results of the United Nations Commission on International Trade Law Working Group V (Insolvency Law) on Centre of main interests in the context of an enterprise group, the proposal of revision of the EC Regulation of Insol Europe (the "INSOL Europe Proposal")³

¹ A business enterprises group is a group of two or more enterprises that are interconnected by control or significant ownership (see: UNCITRAL Legislative Guide on Insolvency Law, UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Part three: Treatment of enterprise groups in insolvency, Glossary). Such an enterprises group is considered to be international if the enterprises have assets and/or activities in different countries. See also proposal of the European Commission amending the EC Regulation definition in article 2 i: "group of companies" means a number of companies consisting of parent and subsidiary companies;

² United Nations Commission on International Trade Law Working Group V (Insolvency Law) Thirty-ninth session Vienna, 6-10 December 2010, A/CN.9/WG.V/WP.95/Add.1, point 5

³ Revision of the European Insolvency regulation, Proposals by Insol Europe (2012)

and the recent proposal of the European Commission amending the EC Regulation⁴ are included, followed by the views of the author on the issue of COMI and enterprise groups. The note ends with a short conclusion.

I. Defining COMI

What is COMI?

Although there is no definition of COMI in the EC Regulation, it is evident that COMI in the EC Regulation 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.⁵ The EC Regulation only applies if the COMI of a debtor is located in the EU⁶ as of the date of the application⁷. The effect of a main proceedings under the EC Regulation is that such a proceedings, which is governed by the law of the Member State in which the proceedings is opened, is automatically recognized within all Member States of the EU⁸. In the case of a company or a 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 contrary⁹. According to the so-called Virgos Schmit report, the registered office normally corresponds to the debtor's head office¹⁰. Under the EC Regulation, every natural person or legal entity has its own COMI and there are no specific rules with regards to group companies¹¹. In the Eurofood case, the European Court of Justice has decided that the presumption of the registered office being the COMI 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.¹² The ECJ gave in its Eurofood decision as an example where such rebuttal might be possible the so-called letterbox companies¹³. More recently, the ECJ has in its Interedil decision of October 20, 2011, reconfirmed its Eurofood decision while providing some additional argumentation concluding that "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties¹⁴.

The Model Law also uses the COMI term. The Model Law is as such not a binding regulation but – as the name implies – may serve as a model to incorporate in the laws of a specific country¹⁵. The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent

⁴ EUROPEAN COMMISSION Strasbourg, 12.12.2012 COM(2012) 744 final 2012/0360 (COD), Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, available at http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf

⁵ Whereas 13 of the EC Regulation

⁶ Whereas 14 of the EC Regulation.

⁷ ECJ January 17, 2006 Schreiber Case C-1/04 Staubitz-Schreiber [2006] ECR I-701, paragraph 29, Fletcher, Law on Insolvency, para 31-046

⁸ Exception is Denmark, see Fletcher, Law on Insolvency, para 31-021 and para 31-039

⁹ Article 3.1 EC Regulation 2nd sentence

¹⁰ See Virgos Schmit Report nr. 75, available at: <http://aei.pitt.edu/952/>: "Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office". See for relevance of Virgos Schmit report in the interpretation of the EU regulation: Bob Wessel, International Insolvency Volume X, para 10439.

¹¹ See Virgos Schmit Report nr. 76: "offers no rule for groups of affiliated companies (parent-subsidiary schemes)"

¹² ECJ May 2, 2006 Case C-341 Eurofood, see Fletcher, Law on Insolvency, para 31-041 ff.

¹³ ECJ May 2, 2006 Case C-341 Eurofood: "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."

¹⁴ Case C-396/09, Interedil Srl, in liquidation versus Fallimento Interedil Srl and Intesa Gestione Crediti SpA. Given the importance of the decision relevant part of decision is included, full decision available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0396:EN:HTML>

¹⁵ The Model Law is adopted (i.e. served as inspiration for changes in law) in following countries listed on the website of Uncitral: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html. For further explanation see: Cross-Border Insolvency, A commentary on the Unictal Model Law (2006)

debtor's assets in one or more Member States or to act as a representative of the foreign proceedings at the time an application under the Model Law is made. Under the Model Law, a foreign main proceedings is accepted as such if it is a foreign main proceedings taking place in the Member State where the debtor has the centre of its main interest¹⁶. Pursuant to article 16 sub 3 of the Model Law, the debtor's registered office is in absence of proof to the contrary presumed to be the centre of the debtor's main interest. The Guide to Enactment to the Model Law mentions that the notion of COMI corresponds to the phrasing in article 3 of the convention that was the precursor to the EC Regulation and acknowledges the desirability of "building on the emerging harmonization as regards the notion of 'main' proceedings"¹⁷.

Samples of Local Case Law

Since the adoption of the EC Regulation in the EU and the incorporation of the Model Law in several countries, adoption by several countries, local courts in the EU and the countries which have adopted the Model Law have been asked to apply the notion of COMI to individual cases. COMI under both the EC Regulation and the Model Law is to be decided per individual debtor, even if such an individual debtor forms a part of an international group of businesses. Both the EC regulation and the Model Law use the presumption of the registered office as indication as the yardstick to deal with the COMI issue. If in an international group of businesses, this presumption would hold for each individual legal entity which forms a part of the group, this would mean that main proceedings would be declared in the jurisdiction of the registered offices of the individual legal entity. Judges have however been creative in trying to get around the assumption, resulting in several cases in which it was decided that the COMI was actually in a different location than the registered office of such legal entity, a flexible COMI approach.

One of the earlier cases is the Daisytek case¹⁸. Daisytek group was headed by Daisytek Inc., a US company.¹⁹ Daisytek Inc. filed on May 7, 2003 for US Chapter 11 proceedings. The sub holding company for the pan-European business group was Daisytek-ISA Ltd, based in Bradford UK. Daisytek-ISA Ltd was a pan-European business which for 50% operated as a reseller and wholesale distributor of electronic office supplies to retailers, and for the other 50 % sold to end users. Daisytek-ISA Ltd furthermore served as a sub holding company for all the other European companies. One of these companies was ISA International plc, which in its turn performed the head office function for the European group.

In total 14 companies, 10 companies with registered offices in the UK, 3 companies with registered offices in Germany and one company with registered office in France have petitioned to the Leeds court for an administration order to be made in order to achieve a more advantageous realization of its assets than would be achieved in a winding-up or its survival or the survival of the whole or part of its undertaking as a going concern. The Leeds court ruled that the COMI of all 14 companies was in Bradford and gave a main

¹⁶ See Model Law Article 2 Definitions under B). Once again, a definition of COMI is lacking under the Model Law.

¹⁷ United Nations Commission on International Trade Law Working Group V (Insolvency Law) Thirty-ninth session Vienna, 6-10 December 2010, A/CN.9/WG.V/WP.95/Add.1, page 3 and The Guide to Enactment to the Model Law 18, 30 and 31.

¹⁸ In re Daisytek-ISA Ltd [2003] BCC 562, See Wessels in International Insolvency Law, Volume X Insolvency Law (2012), page 512 and further for more broad description of Daisytek case, see also Irit Mevorach in Insolvency within multinational enterprise groups, page 180 ff. Wessels considers the Daisytek case as the case that set the tone. See also Moss in COORDINATION OF MULTINATIONAL CORPORATE GROUP INSOLVENCIES: SOLVING THE COMI ISSUE Group Insolvency – Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, p. 1010 ff.

¹⁹ the COMI of this US entity was apparently not in the EU, see for an example where the COMI of a US company was found to be in the EU: Re BRAC Rent-A-Car International Inc. [2003] EWHC (Ch) 128, [2003] 2 All E.R. 201; [2003] BCC and Wessels in International jurisdiction to open insolvency proceedings in Europe, in particular against (groups) of companies, page 9 (Budget group restructuring) and Fletcher in Law on Insolvency, para. 31-037; on the side: BRAC Rent-A-Car International Inc. was already subject to a Chapter 11 proceeding in US; the Model Law is applicable in the UK as of April 4, 2006 (source: Cross-Border Insolvency, A commentary on the UNCITRAL Model law (2006), page 65) so if this Budget group restructuring would take place now, perhaps a different route would be taken to the Chapter 11 proceeding of the US been recognized in the UK. It shows how lively and therefore interesting the international insolvency arena is.

proceedings administration order in respect of 10 UK companies. Furthermore, the court made administration orders in respect of the French and German companies²⁰. The Leeds court referred to eight elements:

1. the finance function of the group is operated from Bradford. The business is funded by a sub of Daisytek-ISA through an UK bank, by a factoring agreement through an UK bank, while their finance function is in accordance with English accounting principles, and reviewed and approved by ISA International plc;
2. the German companies require ISA International plc's approval for any buying in excess of € 5000;
3. all senior employees in Germany are recruited in consultation with ISA International plc;
4. all information technology and support is run from the Bradford office;
5. all pan-European customers are serviced by ISA International plc; 15 % of the sales of the German companies flows from contracts negotiated by and entered into by ISA International plc;
6. 70% of the purchases are under contracts negotiated and dealt with from Bradford;
7. all corporate identity and branding are run from Bradford; and
8. the business of the German companies flows from the CEO's strategy plan, who visits Germany two days a month and spends 30% of his time (mainly in Bradford) on the management of the German companies.

The flexible COMI approach resulting in a single COMI for the group enabled the restructuring of the Daisytek group. Daisytek has been followed by numerous other cases, such as Collins & Aikman, TXU Europe, MG Rover and Eurotunnel²¹. From these decisions it is evident that it is indeed possible that the court concludes that the individual COMI of each of the companies within an international business enterprises group is located in the same jurisdiction even if their registered offices are spread all over Europe, and sometimes even outside Europe. In order to protect the interests of local creditors, so secondary proceedings might be declared in jurisdictions where the relevant companies have a so-called establishment²². These secondary proceedings would be subject to the law of the Member State in which the establishment is situated. In order to avoid these secondary proceedings²³, UK practitioners have in several cases successfully argued with the UK courts that with respect to the assets of the establishment, they would in their UK governed main proceedings be allowed to apply the law that would have been applicable if a secondary proceeding had been declared, thus ensured that the interests of the local creditors were protected²⁴. The recent proposal of the European Commission amending the EC Regulation (to be dealt with later in this note) explicitly concurs with this view²⁵.

²⁰ See for reaction of German and French Courts: Wessels in International jurisdiction to open insolvency proceedings in Europe, in particular against (groups) of companies, page 22 and further. Especially the French courts decisions are interesting: French Nanterre Commercial Court May 23, 2003: COMI French company is France, French Versailles Court of Appeal September 4, 2003: COMI determined by another EU Court is to be upheld, thus UK, and finally French Cour de Cassation June 27, 2006: upheld decision Versailles Court, which is according Wessels, the right approach. See also Irit Mevorach in Insolvency within multinational enterprise groups, page 181.

²¹ See Irit Mevorach in Insolvency within multinational enterprise groups, page 181 note 170 for references.

²² Art. 2 of the Insolvency Regulation provides, for the purposes of the Insolvency Regulation, several definitions, one of which is the one under (h), saying that an 'establishment' shall mean '.... any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'.

²³ The effect of the secondary proceedings might have a disrupted effect since the local insolvency practitioner could take a completely different view.

²⁴ See also Moss in COORDINATION OF MULTINATIONAL CORPORATE GROUP INSOLVENCIES: SOLVING THE COMI ISSUE Group Insolvency – Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, p. 1017 ff. and Wessels in International Insolvency Law, Volume X Insolvency Law (2012), para. 10616a.

²⁵ See new Recital 19a: "Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the liquidator, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the liquidator, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been

An interesting example of deciding in COMI in group insolvencies in the United States using the Model Law is the Main Knitting Group case of 2008²⁶. The parent company operated a garment manufacturing and distribution business in Montreal (Canada) and it had sales in Canada and the US. It had US Delaware incorporated subsidiaries, one engaged in the warehousing and distribution of the parents company's products in New York, the other one was engaged in the import and wholesale of the parent company's products in New York. The CEO of both US subsidiaries was located in Montreal. Bankruptcy proceedings with regards to each three companies were opened in Canada. The Canadian-appointed representative filed a petition in a US Bankruptcy Court under Chapter 15²⁷ for recognition of the Canadian proceedings as main proceedings in the US. The US granted the recognition and relief after a settlement was reached with a local US creditor safeguarding certain rights of the creditor against property of the US subsidiary.

II. **Uncitral Working Group V Work, Insol Europe Proposal and EU Commission Work**

Both the Model Law and the EC Regulation are dealing with single legal entities. UNCITRAL Working Group V has deliberated on the refinement of (the Guide to Enactment of) the Model Law, specifically in relation to the notion of COMI of an enterprise group. Developing a COMI for an enterprise group might support reduction of the costs of parallel proceedings, coordination of a global sale of assets, maximization of the value of all group members, reduction of forum shopping²⁸ and global reorganization of the group. The most recent work of UNCITRAL Working Group V is the report for the forty-third session in April 15-19, 2013.²⁹ Although the UNCITRAL Working Group V has tried to come up with a definition of COMI of an enterprise group, it concluded that it would be difficult to reach a definition. It thereafter bounced the idea of either a coordination centre³⁰ of an enterprise group, but it decided to abandon it apparently due to lack of legal relevancy. Instead it focused on fostering cooperation between, and coordination of, cross-border insolvency proceedings concerning two or more individual members of an enterprise group, building upon the cooperation and coordination provisions of the Model Law between foreign courts and foreign representatives.

The work of UNCITRAL Working Group V however brought more detailed useful factors determining when considering whether or not the COMI of a subsidiary is the same as that of its parent, such as the extent of a subsidiary's independence with respect to financial, management and policy decision-making; financial arrangements between parent and subsidiary, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; and the location where design, marketing, pricing, delivery of

requested when distributing the assets located in that Member State. This Regulation should confer on the liquidator the possibility to give such undertakings."

²⁶ See Irit Mevorach in *Insolvency within multinational enterprise groups*, page 183

²⁷ Chapter 15 is US implementation of the Model Law, see *Cross-Border Insolvency, A commentary on the UNCITRAL Model law* (2006), page 197 ff.

²⁸ One of the aims of the EC Regulation, as reflected in Whereas as 4 is the prevention of forum shopping: "It is necessary for the proper functioning of the internal market 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 (forum shopping)." In the In practice in EU restructurings, quite a lot of forum shopping has taken place, see *Jurisdiction Shopping* by Christine L. Childers and Ronald DeKoven in *Restructuring and Workouts* (2008), p. 99 ff. See for a more recent example *Wind Hellas* by Ben Davies and Mark Glengarry, in *European Debt Restructuring Handbook* (2013), p. 163 ff.

²⁹ *Uncitral Working Group V, report for forty-third session April 15-19, 2013: Centre of Main Interest in the context of and enterprise group* (2013)

³⁰ Some of the basic objectives of identifying a coordination centre for the enterprise group might be according to *Uncitral Working Group V*: (a) To facilitate coordination of multiple proceedings with respect to enterprise group members in order to streamline administration, expedite proceedings and achieve greater efficiency and cost savings; (b) To encourage and provide authorization for cooperation between the courts and insolvency representatives involved; (c) To facilitate exchange of information as regards claims, assets and security interests; (d) To facilitate better realization of the assets of the group, whether through liquidation or reorganization; and (e) To coordinate raising and provision of post-commencement finance across the group.

products and office functions were conducted³¹. The UNCITRAL Working Group V work has also provided some guidance for deciding on the COMI of the controlling member of so-called closely integrated groups³². Relevant factors to be considered are: the extent of group members' independence with respect to financial, management and policy decision-making ("head of the office functions"); financial arrangements between group members, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; the location where design, marketing, pricing, delivery of products and office functions were conducted; and third-party perceptions, in particular those of creditors, concerning that location³³.

In 2012 INSOL Europe released its Insol Europe Proposal proposals for revision of the European Insolvency regulation. The Insol Europe Proposal contains an explicit definition of COMI in article 2³⁴:

"centre of main interests" shall mean in the case of companies ..., the place of the registered office, except that, (i) where the operational head office functions of the company or legal person are carried out in another Member State and that other Member State is ascertainable to actual and prospective creditors as the place where such operational head office functions are carried out, it shall mean and refer to the Member State where such operational head functions are carried out and (ii) where the company or legal person is a mere holding company or mere holding legal person, within a group with head office functions in another Member State, the centre of main interests as defined in the previous sentence is located in such other Member State. The mere fact that the economic choices and decisions of a company are or can be controlled by a parent company in another Member State than the Member State of the registered office does not cause the centre of main interests to be located in this other Member State. "

INSOL Europe's commentary gives an extensive overview of the relevant factors courts have used in the EU when deciding on COMI³⁵. To avoid so-called bankruptcy tourism³⁶ the INSOL Europe's proposal includes in Article 3 (1) a proposal which provides that if the company has moved its COMI less than a year prior to the request for the opening of the insolvency proceedings, only the courts of the Member State where the COMI was located one year prior to the request have jurisdiction to open insolvency if the debtor has left unpaid liabilities caused at the time when its centre of main interests was located in this Member State, unless all creditors of the said liabilities have agreed in writing to the transfer of the centre of main interests out of this Member State.

On December 12, 2012 the European Commission released its proposal for a regulation of the European parliament and of the council amending the EC Regulation³⁷. In its proposal the European Commission

³¹ Uncitral Working Group V, report for forty-third session April 15-19, 2013: Centre of Main Interest in the context of and enterprise group (2013), paragraph 8

³² The suggestion was made that a Group COMI was only to be if there was an enterprise group with closely related members, see e.g. United Nations Commission on International Trade Law Working Group V (Insolvency Law) Thirty-fifth session, Vienna, 17-21 November 2008, A/CN.9/WG.V/WP.82/Add.4

³³ Uncitral Working Group V, report for forty-third session April 15-19, 2013: Centre of Main Interest in the context of and enterprise group (2013), paragraph 9

³⁴ See also Commentary to inclusion of definition of "centre of main interest" page 31 ff. of the Insol Europe Proposal with relevant background information. When drafting this definition, Insol Europe specifically took notice of the court cases dealing with enterprise groups such as: Daisytek, Eurotunnel, Collins & Aikman and MG Rover. Insol Europe also gives specific proposals (in Chapter V and Chapter VI) on the insolvency of groups of companies and a European rescue plan. All of that is beyond the scope of this note.

³⁵ See Commentary to inclusion of definition of "centre of main interest" page 32 ff. point 2.3 to and including 2.11 of the Insol Europe Proposal

³⁶ Bankruptcy tourism, i.e. the flight to a specific jurisdiction to get a bankruptcy proceeding is not a typical international phenomenon, it is also used within the US: see Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy, Kenneth Ayotte and David A. Skeel Jr., European Corporate Governance Institute (ECGI) (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=463001 and Courting Failure of Lynn M. LoPucki (2005)

³⁷ Available at http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf

acknowledges that there have been difficulties in applying the concept in practice and that the EC Regulation's jurisdiction rules have also been criticised for allowing forum shopping by companies and natural persons through abusive COMI-relocation. The European Commission suggests to retain the concept of COMI based on a per legal entity approach (thus not enterprise group approach³⁸) because that concept ensures that the case will be handled in a jurisdiction with which the debtor has a genuine connection rather than in the one chosen by the incorporators. The European Commission takes the view that the COMI approach is also in line with international developments since it has been chosen as a jurisdictional standard by the Model Law. However, in order to give guidance to legal practitioners in determining COMI, the proposal now has a definition of COMI in article 3.1:

“The centre of main interests shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties. 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....”

It also has a new recital³⁹ clarifying the circumstances in which the presumption that the COMI of a legal person is located at the place of its registered office can be rebutted. The language of this recital is taken from the Interedil decision⁴⁰. The European Commission also improves the procedural framework for determining jurisdiction for the opening of proceedings by requiring the court to examine its jurisdiction ex officio prior to opening insolvency proceedings and to specify in its decision on which grounds it based its jurisdiction. Furthermore, the proposal grants all foreign creditors a right to challenge the opening decision and ensures that these creditors are informed of the opening decision in order to be able to effectively exercise their rights⁴¹. The problems of insolvencies of enterprise groups are in the European Commission's view best dealt with through the introduction of an obligation to coordinate insolvency proceedings relating to different members of the same group of companies by obliging the liquidators and the courts involved to cooperate with each other in a similar way as this is proposed in the context of main and secondary proceedings. Such cooperation could take different forms depending on the circumstances of the case.

III. Authors Own Idea on the Question

From personal experience⁴², I know that there is a huge discrepancy between how international business enterprises groups are organised and how such groups deal with the relations between the individual legal entities within such a group⁴³. It is therefore a matter of assessing the relevant facts to see whether or not in a specific case the individual legal entities of the business group have only one COMI or whether there are more. A mandatory Group COMI for all international business groups does not fit the differences between the

³⁸ When drafting the report for the forty-third session April 15-19, 2013, Uncitral Working Group V had the benefit of being able to incorporate the views of the European Commission, see under III Developments in the treatment of enterprise groups in insolvency

³⁹ Recital 13a of the proposal which reads as follows: “The 'centre of main interests' of a company or other legal person should be presumed to be at the place of its registered office. It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties.”

⁴⁰ See note 14 above

⁴¹ See Section 3b of the European Commission Proposal

⁴² The author started to work in the insolvency world as an advocaat (solicitor) in 1989 and has since then (as external and in-house counsel) been involved in numerous bankruptcies involving international enterprise groups.

⁴³ I agree with Mevorach when she says in her conclusions: ..”it is evident that many variations of MEGs (Multinational Enterprise Groups, jtj) in insolvency exist. “, Insolvency within multinational enterprise groups, Irit Mevorach (2009), page 326. In any event, the results of Mevorach's work could assist judges who need to decide on COMI.

relevant groups. I endorse a more flexible COMI approach taken by the courts and prefer this flexible COMI approach above a more rigid one, using for example the registered office of a legal entity as the yardstick. This approach automatically leads to more COMIs in an international business enterprise group, something I think could and should be avoided if indeed a group COMI is available in a case where a closely integrated group, which was ascertainable by third parties (such as in the Daisytek case)⁴⁴, provided however that the local creditors in the other jurisdictions (i.e. the non-main jurisdictions) are sufficiently protected⁴⁵. I favour the suggested amendment of the COMI definition by the European Commission's proposal to that of Insol Europe, since the former is less rigid, enabling the courts to deal with the relevant factors of a case.

IV. Conclusion

The answer to the question raised in this note, i.e. does an international business enterprises group have one COMI or not, that is the question, is in essence fairly simple and an answer quite often used by lawyers when answering questions of their clients: In principle not but in the end it all depends on the relevant facts of the case.

If indeed the international business enterprises group is run in such a manner that, after a comprehensive assessment of all the relevant factors, it is established in a manner that is ascertainable by third parties, that the group is a closely integrated group and the group's actual centre of management and supervision and of the management of its interests is located in one specific Member State, the COMI of all the relevant members of the group might be considered to be located in that specific Member State. If not, the members of international business enterprises group have their own COMI. Both the EC Regulation and the Model Law currently adopt this approach.

⁴⁴ See for a different view Prof. Loes Lennarts Reports 2011, The review of the EU Insolvency Regulation; some proposals for amendments, p. 47 ff.

⁴⁵ See above page 5 how these local creditors are protected, see for a specific protection of secured creditors on local assets section 5 of the EC Regulation